TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~328.~~ 53

JOHN W. DOANE, PATRICK J. TOWLE, AND JOHN ROPER, (PARTNERS, AS J. W. DOANE & CO.,) PLAINTIFFS IN ERROR,

vs.

LOCKHART T. GLENN AND GEORGE O. TALPEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

FILED DECEMBER 5, 1872.

which should have been admitted.

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No. 328.

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1 TERRITORY OF COLORADO, *ss:*

In the supreme court of Colorado Territory, to the February term, A. D. 1872.

At a stated term of the supreme court of Colorado Territory, begun and held according to law, at the city of Denver, in said Territory, on the second Tuesday (it being the thirteenth day) of February, A. D. 1872. Present, honorable Moses Hallett, chief justice; honorable E. T. Wells and honorable James B. Belford, associate justices; William A. Smith, deputy U. S. marshal, and David H. Crater, clerk of said court.

Be it remembered that heretofore, to wit, on the 28th day of August, A. D. 1872, there was filed in the office of the clerk of the supreme court of Colorado Territory a transcript of the record of the district court of the first judicial district of Colorado Territory, in and for the county of Arapahoe, together with a bond, præcipe for writ of error, power
2 of attorney to execute bond, and cast-bond.

Which said transcript of record is pro tanto, as herein transcribed in the words and figures following, to wit:

3 TERRITORY OF COLORADO,
County of Weld, ss:

Pleas in the district court of the first judicial district of Colorado Territory, in and for said county, before the honorable Christian S. Eyster, associate justice of the supreme court of Colorado Territory, assigned to said judicial district, at a term thereof begun and held at the court-house, in Evans, in said county, on the second Tuesday (it being the 13th day) of December, A. D. eighteen hundred and seventy, there being present at said court Hon. Christian S. Eyster, judge of said court, Olliver A. Whittemore, esq., clerk of said court, by F. E. Mayer, deputy clerk; Merrick A. Rogers, esq., district attorney of said judicial district; Jared S. Brush, sheriff of said county.

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs,
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, partners, doing business under the firm-
4 name of Glenn & Talpey, defendants, and Lockhart T. Glenn and George O. Talpey, interpleaders.
} Attachment.

Be it remembered that heretofore, to wit, upon the twenty-second day of September, A. D. eighteen hundred and seventy, came the said plaintiff, by Messrs. Charles and Elbert, their attorneys, and filed in the office of the clerk of the district court of the first judicial district of Colorado Territory, their precipe for a writ of attachment against the said defendants, and also their affidavit in attachment, bond for costs, and attachment-bond; and the said precipe is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Weld, ss:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid, to the December term A. D. 1870.

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, doing business under the firm-name of J. W. Doane & Co.,
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, partners, doing business under the firm-name of Glenn & Talpey.

In attachment. Damages of the sum of ten thousand dollars.

The clerk of said court will please issue a writ of attachment in the above cause against the estate of the said defendants, Oliver S. Glenn and Rufus E. Talpey, directed to the sheriff of said county to execute, and returnable as above.

Amount of claim sworn to in the affidavit, seven thousand one hundred and four dollars and twenty-eight cents, (7,104.28.)

CHARLES & ELBERT,
Attorneys for Plaintiff.

(Endorsed as follows, to wit:) John W. Doane et al. v. Oliver S. Glenn et al. Precipe. Filed in the district court, first judicial district, this 22d day of September, A. D. 1870. Oliver A. Whittemore, clerk. Charles & Elbert, att'ys for pl'ff.

And the said affidavit is in words and figures as follows, to wit:

6 TERRITORY OF COLORADO,
County of Weld, ss:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid, to the December term, A. D. 1870.

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, doing business under the firm-name of J. W. Doane & Co.,
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, partners, heretofore doing business under the firm-name of Glenn & Talpey.

In attachment.

Daniel K. Tenney, agent for John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., states on oath that Oliver S. Glenn and Rufus E. Talpey, partners, heretofore doing business under the firm-name of Glenn & Talpey, are indebted to the said firm of J. W. Doane & Co. in the sum of seven thousand one hundred and four dollars and twenty-eight cents, upon bank-account, for goods, wares, and merchandise sold by
7 the said J. W. Doane & Co. to the said Glenn & Talpey, in the year A. D. 1868. Affiant further states that the said Oliver S. Glenn and Rufus E. Talpey are not residents of the Territory of Colorado; that the said Oliver S. Glenn and Rufus E. Talpey are about to depart from the Territory of Colorado, with the intention of having their

effects removed from said Territory; that the said Oliver S. Glenn and Rufus E. Talpey are about to remove their property from the Territory of Colorado, to the injury of the said John W. Doane, Patrick J. Towle, and John Roper, their creditors as aforesaid; that the said Oliver S. Glenn and Rufus E. Talpey are about to convert their property into money, or otherwise dispose of their property, with the intent of placing it beyond the reach of the said John W. Doane, Patrick J. Towle, and John Roper, their creditors as aforesaid; that the said Oliver S. Glenn and Rufus E. Talpy have fraudulently conveyed their estate, with intent to delay, hinder, and defraud their creditors.

Further affiant saith not.

D. K. TENNEY.

Subscribed & sworn to before me this day of September, A. D. 1870.

{ SEAL DISTRICT COURT } { 1ST JUDICIAL DISTRICT. }

OLIVER A. WHITTEMORE,
Clerk District Court,
First Judicial District.

8 (Endorsed as follows, to wit:) John W. Doane et al. vs. Oliver S. Glenn et al. Affidavit. Filed September 22d, 1870. Oliver A. Whittemore, clerk.

And the said bond for costs is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Weld, ss:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid, to the December term, A. D 1870.

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, as J. W. Doane & Co.,
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, partners, as Glenn & Talpey.
} In attachment.

We do hereby enter ourselves security for costs in this cause and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or any of the officers of this court, pursuant to the laws of this Territory. Dated this 22d day of September, A. D. 1870.

J. SIDNEY BROWN.
9 WOLFE LONDONER.

(Endorsed as follows, to wit:) J. W. Doane et al. vs. Oliver S. Glenn et al. Cost-bond. Filed September 22d, 1870. Oliver A. Whittemore, clerk. Charles & Elbert, att'ys for plaintiff.

And the said attachment-bond is in words and figures as follows, to wit:

Know all men by these presents that we, John W. Doane, Patrick J. Towle, and John Roper, of the county of Cook, State of Illinois, and J. Sidney Brown and Wolf Londoner, of the county of Arapahoe and Territory of Colorado, are held and firmly bound unto Oliver S. Glenn

and Rufus E. Talpey, partners, as Glenn & Talpey, in the penal sum of fourteen thousand and five hundred dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, or administrators, jointly and severally, firmly by these presents, sealed with our seals on this 22nd day of September, A. D. 1870.

The condition of the above obligation is such, that whereas Daniel K. Tenney has, on the day of the date hereof, prayed an attachment
10 out of the district court of the first judicial district of Colorado Territory, within and for the county of Weld, at the suit of John W. Doane, Patrick J. Towle, and John Roper, partners, as J. W. Doane & Co., against the estate of the above-named Oliver S. Glenn and Rufus E. Talpey for the sum of seven thousand one hundred and four dollars and twenty-eight cents; and the same being about to be sued out of said court, returnable on the third Tuesday of December next, to the term of the court then to be holden:

Now, if the said John W. Doane, Patrick J. Towle, and John Roper shall prosecute their suit with effect, or in case of failure therein shall well and truly pay and satisfy the said Oliver S. Glenn and Rufus E. Talpey all such costs in said suit and such damages as shall be awarded against the said John W. Doane, Patrick J. Towle, and John Roper, their heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, and also pay or cause to be paid all damages which may accrue to the said Oliver S. Glenn and Rufus E. Talpey by reason of any excessive levy made under any writ of attachment issued in said suit, then the above obligation to be void; otherwise to remain in full force and effect.

11 JOHN W. DOANE,
PATRICK J. TOWLE, [SEAL.]
JOHN ROPER,
By D. K. TENNEY, *their Ag't.* [SEAL.]
WOLFE LONDONER. [SEAL.]
J. SIDNEY BROWN. [SEAL.]

Signed, sealed, and delivered in presence of—

(Endorsed as follows, to wit:) Attachment-bond. District court. John W. Doane et al. versus Oliver S. Glenn et al. Approved and filed by me this twenty-second day of September, A. D. 1870. Oliver A. Whittemore, clerk.

And thereupon a writ of attachment issued out of the office of the said clerk, and under the seal of said court, against the estate of the said Oliver S. Glenn and Rufus E. Talpy, and directed to the sheriff of Weld County to execute; which said writ of attachment is in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Weld, ss:

The people of the Territory of Colorado to the sheriff of Weld County, greeting:

Whereas D. K. Tenney, agent for J. W. Doane & Co., hath
12 complained on oath to Oliver A. Whittemore, clerk of the district court within and for the county of Weld, that Oliver S. Glenn and Rufus E. Talpey, partners, heretofore doing business under the firm-name of Glenn & Talpey, are justly indebted to the said John W. Doane,

Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., to the amount of seven thousand one hundred and four dollars and twenty-eight cents; and oath having also been made that the said Oliver S. Glenn and Rufus E. Talpey are not residents of the Territory of Colorado, and that said Oliver S. Glenn and Rufus E. Talpey are about to depart from the Territory of Colorado, with the intention of having their effects removed from said Territory; that the said Oliver S. Glenn and Rufus E. Talpey are about to remove their property from the Territory of Colorado, to the injury of the said John W. Doane, Patrick J. Towle, and John Roper; and also that Oliver S. Glenn and Rufus E. Talpey are about to convert their property into money, or otherwise dispose of their property, with the intent of placing it beyond the reach of the said John W. Doane & Co.; and that the said Oliver S. Glenn and Rufus E. Talpey have fraudulently conveyed their estates, with intent to delay, hinder, and defraud their creditors; and the said John W. Doane, Patrick J. Towle, and John
13 Roper having given bond and security according to the direction of the act in such cases made and provided: We therefore command you that you attach so much of the estate, real and personal, of the said Oliver S. Glenn and Rufus E. Talpy to be found in your county as shall be of value sufficient to satisfy the said debt and costs according to the complaint, and such estate so attached in your hands to secure so as to provide that the same may be liable to further proceedings thereupon according to law, at a court to be holden at Evans for the county of Weld, on the second Tuesday of December next, so as to compel the said Oliver S. Glenn and Rufus E. Talpey to appear and answer the complaint of the said John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co.; and that you also summon , as garnishee, to be and appear at the said court on the said third Tuesday of December next, then and there to answer to what may be objected against them, when and w'ere you shall make known to said court how you have executed this writ; and have you then and there this writ.

{ SEAL OF THE DISTICT COURT OF THE FIRST JUDICIAL DISTRICT OF COLORADO. } Witness Oliver A. Whittemore, clerk of said court, and the seal thereof, at Denver aforesaid, this 22d day of September, A. D. 1870.

OLIVER A. WHITTEMORE, *Clerk.*

Now, on this 14th day of Dec., A. D. 1870, by leave of the court, this writ was amended by striking out the words "third Tuesday," and inserting the words "second Tuesday."

F. E. MOYER,
Deputy Clerk.

14 TERRITORY OF COLORADO,
County of Weld, ss:

I have duly executed this writ by levying on seven hundred and fifty-five head of Texas cattle branded 11, six horses, or two mares, & four geld*ens*, one sad'le, one bridle, one heavy wagon, on' sorrel*l* mare, branded $\mathcal{Z}$, connected on right shoulder; one sorrel*l* mare, branded *ox* on left hip, M $ on shoulder; one sorrel*l* horse, branded LL on shoulder; one bay horse, branded |+ on shoulder; one black pony, branded HS on shoulder; one black pony, branded B on shoulder, as I am

therein commanded, and have the said property now in my possession. The within-named Oliver S. Glenn and Rufus E. Talpey are not found in my county.

Done this 25th day of September, 1870, at Evans, Weld Co.

H. T. MUNSEN, *Sheriff*,
By THO'S E. BENSON, *Deputy*.

Endorsed:) Attachment-writ. Docket No. . J. W. Doane et al. versus Oliver S. Glenn et al. Filed in the district court, first ju-
15 dicial district, this 3d day of October, 1870. Oliver A. Whittemore, clerk, by Frank E. Mayor, deputy.

And afterwards, to wit, on the fourteenth day of December, A. D. eighteen hundred and seventy, came the said plaintiffs, by their attorneys, and filed in the office of the clerk of the said district court, in and for the county of Weld, their declaration; which said declaration is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Weld, ss:

In the district court of the first judicial district of Colorado Territory, within and for the county of Weld, of the December term, 1870.

John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs in the suit, by Charles & Elbert, their attorneys, complain of defendants, who were summoned, &c., in a plea of trespass on the case on promises; for that whereas the said defendants heretofore, to wit, on the first day of September, in the year of our Lord one thousand eight hundred and seventy, at Chicago, to wit, at the county aforesaid, were in-
16 debted to the said plaintiffs in the sum of ten thousand dollars lawful money of the United States for the work and labor, care and diligence, of the said plaintiffs, by the said plaintiffs before that time done, performed, and bestowed in and about the business of the said defendants, and for the said defendants, and at their special instance and request; and also in the further sum of ten thousand dollars of like lawful money for divers goods, wares, and merchandise by the said plaintiffs before that time sold and delivered to the said defendants, and at their special instance and request; and also in the further sum of ten thousand dollars of like lawful money, for money by said plaintiffs before that time lent and advanced to, and paid, laid out, and expended for the said defendants, and at their like special instance and request; and also in the further sum of ten thousand dollars of like lawful money for other money by the said defendants before that time had and received to and for the use of the said plaintiffs; and also in the further sum of ten thousand dollars of like lawful money for so much money before that time and then due and payable from the said defendants to the said plaintiffs for interest upon, and for the forbearance and
17 use of divers large sums of money before that time due and owing from said defendant to the said plaintiffs, and by the said plaintiffs foreborne to the said defendants for divers long spaces of time before then elapsed, and at the like special instance and request of the said defendants; and also that the said defendants accounted with the said plaintiffs of and concerning divers other sums of money from the said defendants to the said plaintiffs, before that time due and owing, and then in arrear and unpaid, and upon such accounting the said defend-

ants was then and there found to be in arrear and indebted to the said plaintiffs in the further sum of ten thousand dollars of like lawful money, and being so indebted they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, to wit, the county aforesaid, undertook, and then faithfully promised the said plaintiffs, to pay them the said several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested; nevertheless, the said defendants, not regarding their said several promises and undertakings, have not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiffs, (although often requested so to doe,) but
18 the said defendants to pay them the same have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore they bring suit, &c.

CHARLES & ELBERT,
Attorney for Plaintiff.

Copy of instrument and account sued in said declaration.

Glenn & Talpy in a/c with J. W. Doane & Co. :]

1868.			
Feb. 19.	To mdse. sold and delivered at 60 days.....		$4,162 53
29.	To " " " " " "		13 50
Mch. 9.	" " " " " " "		1,175 51
14.	" " " " " " "		385 37
21.	" " " " " " "		328 15
Apl. 6.	" " " " " " "		1,700 00
20.	" interest		34 68
June 8.	" "		104 54
1870.			
Nov. 19.	" "		1,744 49

CR.

1868.]		
June 1.	By cash.....	$800 00

(Endorsed as follows, to wit :) J. W. Doane et al. vs. Glenn & Talpey. Narr. Filed in the district court this 14th day of December, A. D. 1870. F. E Moyer, deputy clerk.

19 And afterwards, to wit, on the said fourteenth day of December, A. D. eighteen hundred and seventy, it being one of the days of the December term, in said year, of the said district court of the first judicial district of Colorado Territory, in and for the county of Weld, the following proceedings were had and entered of record in said court in said cause, to wit:

And afterwards, to wit, on the same day, come Lockhart T. Glenn and George O. Talpey, by Messrs. France and Rogers, their attorneys, and filed in the office of the clerk of said court their interplea; which said interplea is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Weld, ss :

In the district court of the first judicial district, within and for the county of Weld aforesaid, to the December term, A. D. 1870.

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, copartners, &c.,
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, late copartners, &c.
} In attachment.

Interplea of Lockhart T. Glenn and George O. Talpey in the above-
20 *entitled cause in attachment.*

And now on this day come the above-named Lockhart T. Glenn and George O. Talpey, according to the form of the statute in such case made and provided, and say that heretofore, to wit, on the twenty-second day of September, A. D. eighteen hundred and seventy, a certain writ of attachment issued out of the said district court, within and for the county of Weld, at the suit of John W. Doane, Patrick J. Towle, and John Roper, copartners, doing business under the firm name and style of John W. Doane & Co., against Oliver S. Glenn and Rufus E. Talpey, late copartners, and doing business under the firm name and style of Glenn & Talpey, directed to the sheriff of said Weld County to execute; and afterwards, to wit, on the twenty-third day of September, A. D. eighteen hundred and seventy, the said sheriff of Weld County, under color of the said writ of attachment, seized and levied upon the following-described goods and chattels and personal property, to wit: Seven hundred and fifty-five head of Texas cattle, branded "71;" one sorrel mare, branded $\frac{1}{2}$, connected on right shoulder; one sorrel mare, branded *ox* on left hip; one sorrel horse, branded LL on shoulder; one bay horse, branded H on shoulder; one black pony, branded H. S. on shoulder; one black pony, branded B. on shoulder; one saddle,
21 one bridle, one heavy wagon. And the said Lockhart T. Glenn and George O. Talpey aver that they are not, nor is either of them, a defendant in the above-entitled cause, and that they, the said Lockhart T. Glenn and George O. Talpey, were for a long time before the issuing of the said attachment-writ, to wit, since the twenty-seventh day of May, A. D. eighteen hundred and seventy, and thence hitherto, and are now, the absolute and sole owners of the above-described property, and are entitled to the immediate possession thereof; that the said property was unlawfully seized an' taken as aforesaid, by the sheriff aforesaid, from the actual possession and control of the said Lockhart T. Glenn and George O. Talpey, and not by reason of any process issuing out of any court of the Territory of Colorado against them, the said Lockhart T. Glenn and George O. Talpey, or either of them; that said property is still unlawfully held and detained by the said sheriff, under color of the said writ of attachment; that the said property is of great value, to wit, of the value of fifteen thousand dollars. And this the said Lockhart T. Glenn and George O. Talpey are ready to verify, &c. Wherefore they pray that their right to the
22 above-described property, together with their costs in this proceeding, may be adjudged to them, and that they may have immediate return of the said property.

LOCKHART T. GLENN.
GEORGE O. TALPEY.

FRANCE & ROGERS,
Att'ys for Lockhart T. Glenn & George O. Talpey.

(Endorsed as follows, to wit:) John W. Doane et al. v. Oliver S. Glenn et al. Interplea. Filed in the district court this 14th day of De-

cember, A. D. 1871. F. E. Moyer, deputy clerk. France & Rogers, att'ys.

And afterwards, to wit, on the same day, come the said plaintiff', by their attorneys, and filed their replication to the said interplea; which replication is in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Weld:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid, of the December term, A. D. 1870.

JOHN W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL.

23 And now on this day comes the said plaintiff, and for replication to the said interplea, filed in said cause by the said Lockhart T. Glenn & George O. Talpey, and say that the said property attached and levied upon by virtue of said writ of attachment, & described in the return of the officer serving said writ of attachment, and also described in said interplea, was not the property of the said Lockhart T. Glenn and George O. Talpey at the time of the issuing of the writ of attachment, and of the making of the levy of said writ upon said property, and that the said Lockhart T. Glenn & George O. Talpey were not at the time of said levy of said writ entitled to the possession of the said property; and this the said plaintiff' pray may be inquired of by the county, &c.

BROWNE & CHARLES & ELBERT,
For Pl'ffs.

(Endorsed as follows, to wit:) J. W. Doane et al. vs. O. S. Glenn et al. Replication to the plea of interplea. Filed in the district court this 14th day of December, A. D. 1870. F. E. Moyer, deputy clerk. Browne, Charles & Elbert, for pl'ff'.

And afterwards, to wit, on the said seventeenth day of December, in said year, it being still of the December term of said court, in
24 said year, the following further proceedings were had and entered of record in said court in said cause, to wit:

J. W. DOANE ET ALS.
vs.
OLIVER S. GLENN ET ALS. } Attachment.

In the matter of the interplea filed by Lockhart T. Glenn, George O. Talpey, in the attachment-case now pending in said court, wherein John W. Doane and others are plaintiff', and Oliver S. Glenn and Rufus E. Talpey are defendants, it is hereby stipulated by the attorneys for J. W. Doane & Co., and by Rogers & France, the attorneys for Lockhart T. Glenn and George O. Talpey, that the interplea, and the issues joined therein, may be tried at the January term, A. D. 1871, of the Arapahoe County district court, this stipulation to affect the inter-

plea only, and to be in no wise considered as affecting the defendants in the attachment.

CHARLES & ELBERT,
For J. W. Doane et al.
FRANCE & ROGERS,
For Lockhart T. Glenn & George O. Talpey, interpleaders.

25 Whereupon it was considered by the court that the venue of this cause be changed from the county of Weld, in the first judicial district, to the county of Arapahoe, in the said district, and that this cause be transmitted to the district court of the first judicial district of Colorado Territory, sitting within and for the county of Arapahoe, for further proceedings according to the form of the statute in such case made and provided.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the first judicial district of Colorado Territory, sitting in and for the county of Arapahoe, before the honorable Ebenezer T. Wells, associate justice of the supreme court of said Territory, assigned to said judicial district, at a term thereof begun and held at the court-house in the city of Denver, in said county, on the second Tuesday (it being the thirteenth day) of June, A. D. eighteen hundred and seventy-one—Hon. Ebenezer T. Wells, judge of said court; Merick A. Rogers, esq., district attorney of said district; David J. Cook, esq., sheriff of said county, and George H. Mills, clerk of said court.

26 And afterwards, to wit, on the nineteenth day of July, A. D. eighteen hundred and seventy-one, it being still of the June term in said year of said court, the following further proceedings were had and entered of record in said court in said cause, to wit:

J. W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL., DEF'D'TS, AND LOCKhart T. Glenn et al., interpleaders. } Attachment.

Now, on this day, comes the said plaintiffs, by Messrs. Charles and Elbert, their attorneys, and the said interpleading claimants, by Messrs. France & Rogers, their attorney', also come, and thereupon comes a jury of twelve good and lawful men, to try the issues herein joined between the said plaintiffs and the said interpleading claimants, to wit, William H. Scott, Isaac Rosenbloom, Jonas Deitsch, Peter P. Herbert, Edwin R. Conan, George Bennett, George H. Greenslit, M. E. Ward, J. S. Rubicam, James A. Jones, Joseph Kline, and Samuel N. Hoyt, and they are duly selected and tried, empannelled and sworn, to well and truly try the issues herein joined between the said plaintiffs and the said interpleading claimants, and a true verdict give according to the evi-
27 dence, and thereupon came the evidence until the hour of adjournment, when the further hearing of this cause was postponed until to-morrow (Thursday) morning.

And afterwards, to wit, on the twentieth day of July, A. D. eighteen hundred and seventy-one, it being still of the June term in said year of said court, the following further proceedings were had and entered of record in said court in said cause, to wit:

JOHN W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL., AND LOCKHART T. Glenn and George O. Talpey, interpleaders. } Attachment.

Now, on this day, come the said plaintiffs, by Messrs. Charles and Elbert, their attorneys, and the said interpleading claimants, Lockhart T. Glenn and George O. Talpey, by Messrs. France and Rogers, their attorneys, also come, and the jury heretofore empannelled and sworn in this cause being all present here in court in the jury-box, the hearing of the evidence in this cause was resumed and continued until the hour of adjournment, when the further hearing of this cause was postponed until to-morrow (Friday) morning.

28 And afterwards, to wit, on the twenty-first day of July, A. D. eighteen hundred and seventy-one, it being still of the June term of said court in said year, the following further proceedings were had and entered of record in said court in said cause, to wit:

J. W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL., AND LOCKHART T. Glenn and George O. Talpey, interpleaders. } Attachment.

Now, on this day, come the said plaintiffs, by Messrs. Charles and Elbert, their attorneys, and Lockhart T. Glenn and George O. Talpey, the interpleading claimants herein, by Messrs. France and Rogers, their attorneys, also come, and the jury heretofore empannelled and sworn in this cause being all present here in court in the jury-box, the further hearing of the evidence in this cause was resumed and concluded, after which, and the argument of counsel and the instructions of the court to the jury, the jury retired to their room in charge of a sworn bailiff, to consider of their verdict; and, by agreement of parties,
29 it is ordered by the court that, if the said jury agree upon a verdict during the recess of the court before its next incoming, they may reduce the same to writing, and, after sealing the same and delivering it to the bailiff in charge, may separate and meet the court on its incoming on to-morrow (Saturday) morning.

And afterwards, to wit, on the twenty-second day of July, A. D. eighteen hundred and seventy-one, it being still of the June term of said court in said year, the following further proceedings were had and entered of record in said court in said cause, to wit:

J. W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL., LOCKHART T. GLENN and George O. Talpey, interpleaders. } Attachment.

Now, on this day, come the said plaintiffs, by Messrs. Charles and Elbert, their attorneys, and the said interpleading claimants, Lockhart T. Glenn and George O. Talpey, by Messrs. France and Rogers, their attorneys, also come, and the jury heretofore empannelled and sworn in this cause having agreed upon a verdict during the recess of the
30 court, and having reduced the same to writing, and having sealed it up and delivered it to the sworn bailiff in charge, in accordance

with the order of the court heretofore made in this cause, and the said jury, being all present here in court in the jury-box, upon their oaths say, that they find the issues joined in this cause between the said plaintiffs, Lockhart T. Glenn and George O. Talpey, interpleading claimants, for the said interpleading claimants.

And afterwards, to wit, on the twenty-ninth day of July, A. D. eighteen hundred and seventy-one, it still being of the June term of said court in said year, the following further proceedings were had and entered of record in said court in said cause, to wit:

J. W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL., AND LOCKHART T. Glenn and George O. Talpey, interpleaders. } Attachment.

Now, on this day, come the said plaintiffs, by Messrs. Charles and Elbert, their attorneys, and the interpleading claimants herein, Lockhart T. Glenn and George O. Talpey, by Messrs. France and Rogers,
31 their attorneys, also come, and the court having heretofore heard the argument of counsel upon, and taken under advisement, the motion of the said plaintiffs for a new trial of the interplea in this cause, and the court being fully advised in the premises, it is considered by the court that the said motion be overruled; whereupon the said interpleading claimants, by their attorneys aforesaid, move the court for a judgment upon the verdict of the jury in this cause. Therefore, all and singular the premises being seen and by the court here fully understood, it is considered by the court that the property taken by virtue of the writ of attachment in this cause be delivered up to the said Lockhart T. Glenn and George O. Talpey, and that a writ of retorno habendo be awarded and issued therefor. And it is further considered by the court that the said interpleading claimants do have and recover of and from the said plaintiffs their costs by them in and about this said suit in this behalf laid out and expended, taxed at and have execution therefore.

And afterwards, to wit, on the same day, the following further proceedings were had and entered of record in said court in said cause, to wit:

32 J. W. DOANE ET AL.
vs.
O. S. GLENN ET AL., AND L. T. GLENN ET AL., interpleaders. } Attachment.

At this day come the said plaintiffs, by Messrs. Charles and Elbert, their attorneys, and the interpleading claimants herein Lockhart T. Glenn and George O. Talpey, by L. B. France, esq., their attorney, also come, and, on motion of the said plaintiffs, day is given to the said plaintiffs until and upon thirty days from this date to pay and procure a writ of error and supersedeas thereon out of the supreme court of the Territory of Colorado to reverse the judgment of this court upon the issue between the said plaintiffs and the said interpleading claimants joined. And it is ordered by the court that all proceedings upon the said judgment of this court be stayed during the said thirty days.

And afterwards, to wit, on the twenty-third day of August, A. D. eighteen hundred and seventy-one, came the said plaintiffs, by their attorneys, and filed in the office of the clerk of said court their bill of exceptions; which said bill of exceptions is in words and figures as follows, to wit:

33 TERRITORY OF COLORADO,
County of Arapahoe:

In the district court of the first judicial district of Colorado within and for the county aforesaid, of the June term thereof, A. D. 1871.

J. W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL., AND LOCKHART T. Glenn and George O. Talpey, interpleading claimants, claiming the cattle attached in said suit. } Attachment.

Be it remembered that on this 19th day of June, in the year of our Lord one thousand eight hundred and seventy-one, said day being one of the days of the June term of said court, A. D. 1871, came on to be tried by a jury the issues joined in this cause between the said plaintiffs in this suit, and the said Lockhart T. Glenn and George O. Talpey, interpleading claimants, who, by virtue of the statute in such case made and provided, had heretofore filed in this suit their said plea of interplea, claiming the said cattle heretofore attached in this suit. Where-
34 upon the said interpleading claimants produced as a witness in their behalf THOMAS E. BENSON, who, in his direct examination, testified as follows, to wit:

"About 23d of September last was deputy sheriff of Weld County. Knew Glenn & Talpey, but not Doane & Co. I know both Glenns and both Talpeys. (Shown writ.) I recognize it. This is my signature to this return. When I levied this writ I found the property in possession of George Glenn and Dr. Talpey. Found the property about nine miles west of Greeley, in Weld County."

On his cross-examination the witness Benson testified as follows:

"These young men were in possession of the cattle. They had some herders with them, one colored fellow driving a team and one other man on horseback. There was a man there by name of Stone. He was then assisting to drive the cattle. He didn't belong to the outfit. They were then with them. Don't know that they (the interpleaders) were in possession more than the other men who were there, except from what they told me. I saw them there with the cattle. So were the other men as much as they were."

35 Said witness Benson, on his re-examination by the attorneys for the interpleading claimants, testified as follows:

"The other men there were Archie King, and another man called Billy, and Stone. I never saw these men before."

Whereupon the testimony of said witness Benson being closed, the said plaintiffs, by their attorneys, moved the court to strike out the testimony of said witness Benson as to the fact of said cattle when attached being in the possession of the said interpleading claimants, for the rea-

sion that it appeared on the cross-examination of said witness that he derived his information of said fact from the interpleading claimants only when serving said writ of attachment, and because his knowledge of such fact is hearsay only; which motion, after argument of counsel, was overruled by the court, to which said ruling of the court, in overruling said motion, the said plaintiffs, by their attorneys, then and there excepted.

The said interpleading claimants, further to sustain the issue on their behalf, offered in evidence the original writ of attachment issued
36 in said cause, on which property is levied and taken, dated Sept. 22, A. D. 1870, and the sheriff's return on the same; to the introduction of which said writ of attachment and return thereon in evidence, the said plaintiffs, by their attorneys, then and there objected; which said objection was overruled by the court; to which said ruling of the court in admitting said writ and return to be read in evidence to the jury, the said plaintiffs, by their attorneys, then and there excepted; which said writ and return was then read in evidence to the jury, in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Weld, ss:

The people of the Territory of Colorado to the sheriff of Weld County, greeting:

Whereas D. K. Tenney, agent for J. W. Doane & Co., hath complained on oath to Oliver A. Whittemore, clerk of the district court within and for the county of Weld, that Oliver S. Glenn and Rufus E. Talpey, partners, heretofore doing business under the firm-name of Glenn & Talpey, are justly indebted to the said John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., to the amount of seven thousand one hundred and four dollars and twenty-eight cents; and oath having also been
37 made that the said Oliver S. Glenn and Rufus E. Talpey are not residents of the Territory of Colorado, and that said Oliver S. Glenn and Rufus E. Talpey are about to depart from the Territory of Colorado with the intention of having their effects removed from said Territory; that the said Oliver S. Glenn & Rufus E. Talpey are about to remove their property from the Territory of Colorado, to the injury of the said John W. Doane, Patrick J. Towle, & John Roper, and also that the said Oliver S. Glenn & Rufus E. Talpey are about to convert their property into money, or otherwise dispose of their property, with the intent of placing it beyond the reach of the said John W. Doane & Co.; and that the said Oliver S. Glenn & Rufus E. Talpey have fraudulently conveyed their estate with intent to delay, hinder, & defraud their creditors; and the said John W. Doane, Patrick J. Towle, and John Roper having given bond and security according to the direction of the act in such cases made and provided: We therefore command you that you attach so much of the estate, real and personal, of the said Oliver S. Glenn and Rufus E. Talpey to be found in your county as shall be of value sufficient to satisfy the said debt and costs according to the complaint, and such estate so attached in your hands to secure so as to provide that the same may be liable to further proceedings thereupon according to law, at a court to be holden at Evans, for the county of Weld, on the second Tuesday of December next, so as to com-
38 pel the said Oliver S. Glenn and Rufus E. Talpey to appear and

answer the complaint of the said John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co.; and that you also summon , as garnishee, to be and appear at the said court on the said third Tuesday of December next, then and there to answer to what may be objected against them, when and where you shall make known to said court how you have executed this writ, and have you then and there this writ.

Witness Oliver A. Whittemore, clerk of said court, and the seal thereof, at Denver aforesaid, this 22d day of September, A. D. 1870.

{DISTRICT COURT OF COLORADO, 1ST JUDICIAL DISTRICT. SEAL.} OLIVER A. WHITTEMORE, *Clerk.*

Now on this 14th day of Dec., A. D. 1870, by leave of the court, this writ was amended by striking out the words "third Tuesday," and inserting the words "second Tuesday."

F. E. MOYER,
Deputy Clerk.

TERRITORY OF COLORADO,
County of Weld, ss:

I have duly executed this writ by levying on seven hundred and fifty-five head of Texas cattle, branded 71; six horses, or two mares and four geld*ens;* one saddle, one bridle, one heavy wagon, one sorrel mare branded 3, connected on right shoulder; one sorrel mare, branded *ox* on left hip in ⊕ on shoulder; one sorrel horse, branded ILL on shoulder;
one bay horse, ||, ⫲ on shoulder; one black pony, branded
39 ⫲. *s* on shoulder; one black pony, branded B on shoulder; as I am therein commanded and have the said property now in my possession. The within-named Oliver S. Glenn & Rufus E. Talpey are not found in my county. Done this 23d day of September, 1870, at Evans, Weld Co.

H. T. MUNSON, *Sheriff,*
By THOMAS E. BENSON, *Deputy.*

(Endorsed:) Attachment-writ. J. W. Doane et al. versus Oliver S. Glenn et al. Filed in the district court this first judicial district, 3d day of October, 1870. Oliver A. Whittemore, clerk, by Frank E. Moyer, deputy.

The interpleading claimants, further to sustain said issue on their behalf, then introduced as a witness on their behalf RUFUS E. TALPEY, one of the defendants in this suit, who, being sworn in said cause, testified as follows, to wit:

"I know the property in dispute here. I can state who the owners of it are. George O. Talpey and Lockhart T. Glenn are the owners. It consists of a herd of cattle. There were 755 head of cattle. Most of them were branded "71," on no particular portion of the body I believe. I
don't know of any other property, except the camp outfit; proba-
40 bly a wagon and six horses. That is all I know of."

On his cross-examination the witness Rufus E. Talpey testified as follows:

The plaintiffs, by their attorneys, asked the witness the following question: "Where did L. T. Glenn and George O. Talpey get these cattle?"

(To the asking of which question the interpleading claimants, by their attorneys, objected on the ground that it was immaterial and irrelevant; which objection was overruled by the court; to which ruling of the court the interpleading claimants, by their attorneys, then and there excepted.)

Ans. of witness. "They bought them in Benton County, Texas. I think it was during May, 1870. I think they purchased 800 head even, all from one firm. The firm name was Shipley, Harmonson & Bush. The firm lived in Elizabethtown, Benton County, Texas."

The plaintiffs, by their attorneys, then asked the following question: "What did they pay for those cattle?"

The witness answered as follows: "I can't state the amount. I was not present when the contract was made, nor when they paid for them."

The plaintiffs, by their attorneys, then asked the following question: "Can't you state what they paid per head for those cattle?"

41 And witness answered as follows: "They told me $4 per head; that is my understanding. I can't state it positively. Didn't see them pay for them. Was not present when they made the contract. They bought them all of one party. They didn't buy in parcels. I didn't see money paid. Wasn't present when contract was made. The contract, I believe, was in writing. Never saw it. Saw the cattle penned. Saw them in possession of them. That is the ground of my testimony, that they bought them. O. S. Glenn was along in that trip to Texas with me and defendants."

The plaintiffs, by their attorneys, then asked the following question: "Was he (Oliver S. Glenn) a former partner of yours?"

Which said question was answered by the witness, "Yes."

(Whereupon the said interpleading claimants, by their attorneys, moved the court to strike out said answer to said question, which said motion was sustained by the court; to which ruling of the court in striking out said answer, the said plaintiffs, by their attorneys, then and there excepted.)

The plaintiffs, by their attorneys, then asked the following question of said witness: "Are you one of the defendants in the attachment-suit of Doane & Co. vs Glenn & Talpey?"

42 And the witness answered the question as follows: "I have no means of knowing that I am."

The plaintiffs, by their attorneys, then asked the witness the following question: "Don't you know there is a suit pending in this court, in which J. W. Doane et als. are plaintiffs, and Oliver S. Glenn and Rufus E. Talpey are defendants?"

The witness answered as follows: "I only know it from hearsay; never have been served with any process here or elsewhere. I knew of the cattle being attached on that writ from hearsay; never employed an attorney to defend that suit for me; didn't employ an *an* attorney to make a special appearance in that case and move to quash the writ; never was present at all. I never had a conversation with an attorney about that case. I didn't employ an attorney in that case indirectly by means of some one else; never instructed anybody to employ an attorney in that case."

The plaintiffs, by their attorneys, then asked the said witness the following question: "Did you never converse with Oliver S. Glenn about employing an attorney in the case of John W. Doane & others vs. Oliver S. Glenn & Rufus E. Talpey?"

Witness answered the question as follows: "I can't state posi-

43 tively that I did. I was not in Weld County when the case was called. I wasn't subpœnaed, and didn't see Mr. Glenn for a long time after that. By the case I mean the attachment-case which you mention. I knew that the court sat in Weld County; knew there was a case to be heard there. I supposed the plaintiffs were J. W. Doane & Co., and the defendants Glenn & Talpey. I suppose I am the Talpey who was defendant."

(Whereupon the interpleading claimants, by their attorneys, moved the court to strike out this answer and all testimony since the last interrogatory, on the ground that it is hearsay and immaterial, which said motion was sustained by the court, and to which ruling of the court the said plaintiffs, by their attorneys, then and there excepted.)

The plaintiffs, by their attorneys, then asked the witness the following question: "Did you not confer with Oliver S. Glenn, the defendant in the suit of which you speak, with reference to employing an attorney to represent you in that suit?"

"I did not; don't think I ever had any talk with him about that suit. I knew by hearsay there was a suit pending in Weld County, and I can't say that I ever talked with him about that suit; have heard he em-

44 ployed an attorney in that suit; don't know when the suit was pending. I was in Larimer County. Oliver S. Glenn was not in Larimer County. He was in Weld Co., and I think was subpœnaed in that suit. I don't know. I testified in the bankruptcy-case last fall."

The plaintiffs, by their attorneys, then asked the witness the following question: "Did you not testify in regard to that suit in the bankruptcy-case?"

And the said witness answered the question as follows: "I don't know as I understand that question. I testified in the bankruptcy-case of Farwell vs. Glenn & Talpey."

Plaintiffs, by their attorneys, then asked the witness the following question: "Did you not in your testimony in that case speak of the attachment-suit of J. W. Doane et al. vs. Glenn & Talpey, then pending in Weld County?"

To which the witness answered, "I don't recollect of it if I did. I have no recollection of it now."

Plaintiffs, by their attorneys, then asked the witness the following question: "Did you not in your testimony in the bankruptcy-case state that the cattle then in the custody of marshal had been seized by a writ of attachment in a suit against Oliver S. Glenn and yourself?"

45 And the witness answered the question as follows: "I have no recollection of it, though I knew of an attachment-suit pending in Weld Co. of Doane & Co.; heard that the attachment had been levied on the cattle, and may have spoken of it in my testimony, but what, I have no recollection of it now."

Plaintiffs, by their attorneys, then asked the witness the following question: "Did you not, on or about the time of the pendency of the bankruptcy-suit, talk with Thomas Benson, on your way from Weld County to Denver, while you were under arrest, about the pendency of the attachment-suit of J. W. Doane et al. vs. Oliver S. Glenn & Rufus E. Talpey?"

And the said witness answered the question as follows: "I think I had some conversation; what it was I don't recollect now. I knew then of the pendency of that suit. I think Benson told me of it. The two interpleaders in the case were with me in Texas at the time the cattle

were purchased. I think I was in same town the day they purchased. Oliver S. Glenn was down there."

Plaintiffs, by their attorneys, then asked the witness the following question: "Had you ever any partnership-relation with the Oliver S. Glenn of whom you speak?"

46 The witness answered the question as follows: "I had up to 9th of June, 1868."

The plaintiffs, by their attorneys, then asked the witness the following question: "From what point did you four gentlemen start for Texas for the purpose of purchasing these cattle?"

(To the asking of which question the interpleading claimants, by their attorneys, objected on the ground that it assumed a fact not proved, which objection was sustained by the court; to which ruling of the court the said plaintiffs, by their attorneys, then and there excepted.)

The said witness then testified as follows: "Can't state exactly how long we four remained in Texas at that time; about 30 days. I started from Leavenworth City to go to Texas; think we left the 2d day of April."

Plaintiffs, by their attorneys, then asked the said witness the following question: "Did any one start with you from that place to go to Texas; and, if so, who?"

The witness answered the question as follows: "George O. Talpey and L. T. Glenn started with me."

47 Plaintiffs, by their attorneys, then asked the witness the following question: "Did any one join you on the route to Texas; if so, who?"

And the said witness answered the question as follows: "Yes, sir; O. S. Glenn; he went with us to Texas."

Plaintiffs, by their attorneys, then asked the witness the following question: "Did you three, who met in Leavenworth, Ap'l 2d, meet there by arrangement?"

The witness answered as follows: "We were not in Leavenworth on 2nd of April."

Plaintiffs, by their attorneys, then asked the witness the following question: "Did you and L. T. Glenn and George O. Talpey meet at Leavenworth, Kansas, about Ap'l 1st, 1870, by arrangement?"

Answer of witness. "We did not."

Plaintiffs, by their attorneys, then asked the witness the following question: "Did Oliver S. Glenn join you at Fort Scott at the time you speak of by arrangement?"

48 The witness answered as follows: "I don't know that he had made arrangements to join the party at Fort Scott, or any particular point, but I know that he intended to join the party at some point on the road; think his brother, Lockhart T. Glenn, told me so. I had been in Leavenworth when I met the claimants, about a week, perhaps longer, before the second of April. Oliver S. Glenn was not with me at Leavenworth, Kansas. I met him there, not about the 1st of April, probably about 15th February, 1870. I think I met him in Leavenworth after Feb'y, and before meeting him at Fort Scott; can't say at what time in particular. Don't know as I have any means of knowing how long claimants had been at Leavenworth before starting south; think it was more than a day; probably more than five days. They might have been there two weeks, and maybe more. During that two weeks, don't know but what O. S. Glenn was in Leavenworth; knew he had gone home, and whether he had returned I can't state."

Plaintiffs, by their attorneys, then asked the following question:

"Did not Oliver S. Glenn, on or about this 2nd day of April, of which you speak, meet you at a point near Leavenworth, Kansas?"

The witness answered as follows: "We met him; he had gone
49 into the country, directly in our road, and we met him there, probably 16 miles out of Leavenworth; he had gone out there from Leavenworth. I didn't swear he was not in Leavenworth."

Plaintiffs, by their attorneys, then asked the witness the following question: "Don't you know that Oliver S. Glenn was in Leavenworth for a number of days during the two weeks of which you speak?"

The witness answered the question as follows: "I think that he was."

Plaintiffs, by their attorneys, then asked the said witness the following question: "From what point did you go to Leavenworth at the time of which you speak?"

The witness answered as follows: "I think I went from home. I was in Leavenworth several times. The last time before going to Texas, I went there from home. When I was there in February, and met O. S. Glenn, I came from home in Missouri."

Plaintiffs, by their attorneys, asked the following question: "To what point did O. S. Glenn go from Leavenworth after you met him in Feb'y?"

50 The witness answered as follows: "I think the first point was to Ohio; that was after meeting him there in February. He returned to Leavenworth some time in March. I think his brother, Lockhart T. Glenn, came with him."

Plaintiffs, by their attorneys, then asked the witness: "Where were you in January, 1870?"

Witness answered as follows: "I was, I think, in Wyoming; not positive now; don't recollect exactly."

Plaintiffs, by their attorneys, then asked the witness: "Were you not in La Porte, Colorado, during part of January, 1870?"

The witness answered as follows: "I might have been; can't state positively."

Plaintiffs, by their attorneys, then asked the witness: "Where you in La Porte during the spring of 1870, or winter of A. D. 1869 & 1870?"

The witness answered: "I wasn't in Colorado in 1869, to my knowledge."

Plaintiffs, by their attorneys, then asked the witness: "Did you not meet Oliver S. Glenn, your former partner in La Porte, in January, 1870, and did you not both board together at the house of Henry Chamberline, who lives near La Porte?"

The witness answered: "I think I did for a portion of the time; not positive as to the date; can't say how long we boarded there; a
51 week, probably three weeks; can't state the time; can't state the month. It was prior to our meeting in Leavenworth, in February, 1870."

Plaintiffs, by their attorneys, then asked the witness: "Did you ever meet Lockhart T. Glenn prior to the time you and Oliver S. Glenn were boarding at Chamberline's?"

The witness answered: "No, sir; don't think I ever did."

Plaintiffs, by their attorneys, then asked the witness: "At the time you were boarding with Oliver S. Glenn at Chamberline's, where was your brother, Geo. O. Talpey?"

The witness answered: "Think he was in Wyoming Territory; I wasn't in Colorado in 1869; boarded at Chamberline's before going to Leavenworth in Feb'y; in February, 1870. It was about 15th Feb'y, I met Glenn down there; it was between 1st of January, 1870, and 15th of February, that we boarded at Chamberline's."

Plaintiffs, by their attorneys, then asked the witness: "At the time you and Oliver S. Glenn were boarding at Chamberline's near La Porte, did you not arrange to go to Texas and purchase cattle?

The witness answered: "I did not."

52 Plaintiffs, by their attorneys, then asked the witness: "Did not you and Mr. Glenn, when you were boarding there from day to day, examine a map of the United States and trace out a route from Texas to Colorado?"

The witness answered: "I did not. It never occurred to me. There never was a time that Texas cattle were mentioned by me to him."

Plaintiffs, by their attorneys, then asked the witness: "Were not you and Mr. Glenn examining a map of the State of Texas, at that time, from day to day?"

The witness answered: "No, sir."

Witness then testified as follows: "Left Chamberlin's, I think, either in January or February; think it was about 1st of February; went to Leavenworth, not in company with Oliver S. Glenn; met him there about 15th of February."

Plaintiffs, by their attorneys, then asked the witness: "Was that meeting by arrangement or accidental?"

The witness answered: "I started for home; got to Leavenworth; was taken sick; Glenn had come there to be married, and I met him; there was no pre-arrangement for a meeting."

53 Plaintiffs, by their attorneys, then asked the witness: "After leaving Chamberlin's, and before going to Leavenworth, did you see George O. Talpey, your brother?"

The witness answered: "Yes, sir; in Wyoming. He went with me as far as Leavenworth. Don't think he was, in February, when O. S. Glenn was there. Think he went home.

Plaintiffs, by their attorneys, then asked the witness: "In February, when you were in Leavenworth, did you make any arrangement with O. S. Glenn to go to Texas and get cattle?"

The witness answered: "I never had any such conversation with him; never did in my life."

Plaintiffs, by their attorneys, then asked the witness: "In what capacity did you go to Texas at that time?"

The witness answered: "I was employed to go by my brother; no one else employed me. Don't think I had any conversation with Mr. Glenn about employing me. I don't know as I can state his age. By my brother I mean George O. Talpey. I guess he was twenty-one. I suppose he is twenty-two past now; I am twenty-eight next October. Don't know that George O. Talpey was under twenty-one at that

54 time. I was employed by the month. He was to pay me $100 per month."

Plaintiffs, by their attorneys, then asked the witness: "In what capacity did Oliver S. Glenn go down there?"

The witness answered: "I don't know in what capacity he went, nor how he was employed. I know he went along and that's all I know. Don't know positively that he was employed at all *all*. Never talked with him about it."

Plaintiffs, by their attorneys, then asked the witness: "Was the one hundred dollars you was to get to come from him or from young Glenn and him together?"

The witness answered as follows: "I never had any conversation with L. P. Glenn, and he was under no obligation to pay me anything. My arrangement was entirely with my brother so far as pay was concerned."

Plaintiffs, by their attorneys, then asked the witness: "After these cattle were purchased, what was done with them?"

The witness answered as follows: "They were driven to Colorado; to Weld Co., I think. I came with these cattle from Texas to Colorado; my brother also. He had charge of the herd. Lockhart P. Glenn
55 did also. Oliver S. Glenn came as far as Abilene. Think that is the point he went home from. Don't know as I can state what time we got into Colorado with these cattle. Think it was in the early part of September, Glenn's home that he went to was in Leavenworth, Kansas. I next saw Oliver S. Glenn after he left us at Abilene here in Colorado. Can't state the time. It wasn't in Pueblo; it was in Larimer Co. or Weld Co. Can't state it was in Greeley. It was in the month of September; I think we arrived with the cattle about the 1st of Sept. near Greeley. Don't know how long after this it was I met O. S. Glenn. It wasn't on the same day; don't think it was next day. It was shortly after we got here. This meeting was totally unexpected to me. The meeting in February was as I have stated. The meeting in March was not pre-arranged. My object in going to Texas was because I was employed."

Plaintiffs, by their attorneys, then asked the witness: "Didn't you state in your testimony in that bankrupt case that you went there for the purpose of buying cattle?"

The witness answered: "If I ever said I went for that purpose, my individual self, I don't recollect it, and must have been out of my mind."

56 Plaintiffs, by their attorneys, then asked the witness: "Did you not state in your testimony in that bankrupt case, 'I bought some cattle, between 800 & 900 head in Texas; they were driven to Colorado. I have reason to suppose they are the same cattle in the hands of the marshal?'"

The witness answered as follows: "I never bought a hoof of cattle in my life, and if I made any statement in the bankrupt case that I individually bought any cattle I have no recollection of it."

Plaintiffs, by their attorneys, then asked the witness: "Do you swear you didn't make that statement?"

The witness answered as follows: "I swear that I firmly believe that I didn't make any such statement."

Plaintiffs, by their attorneys, then asked the witness: "Do you swear positively you did not?"

The witness answered as follows: "I have a firm belief I didn't."

Plaintiffs, by their attorneys, then asked the witness: "Do you swear positively that you didn't state on that trial your object in going
57 there was to buy cattle?"

The witness answered as follows: "I have no recollection; I can't make a positive answer as to that. I am satisfied in my own mind I didn't. I suppose, from what I have heard and seen him do, that O. S. Glenn went down there because he was employed."

Plaintiffs, by their attorneys, then asked the witness: "At the time you were in Leavenworth, Kansas, about 1st of April, 1870, didn't you and Oliver S. Glenn, Geo. O. Talpey, and Lockhart T. Glenn meet and confer with regard to the trip to Texas?"

The witness answered as follows: "No, sir; I hadn't held any conversation with O. S. Glenn about going to Texas till a few days before we started. We went to Texas in a waggon; three of us to Fort Scott, and four of us from there on."

Plaintiffs, by their attorneys, then asked the witness: "Did you and

Geo. O. Talpey and L. P. Glenn, before starting to Texas and while in Leavenworth about 1st of April, 1870, meet and confer with regard to this trip to Texas?"

58 The witness answered as follows: "I don't know but it was talked of; I made no arrangement about it myself. I went on wages, because I was employed. Never talked with O. S. Glenn till a few days before we left, and he was undecided as to whether he would go or not. The conversation was in Leavenworth. I am positive about that conversation. I stated a while ago I had no particular recollection of meeting O. S. Glenn in Leavenworth. You asked me about exact dates. I don't know as I recollect any particular conversation with O. S. Glenn."

Plaintiffs, by their attorneys, then asked the witness: "Don't you know of your own knowledge how much of that money your brother paid for the cattle?"

The witness answered as follows: "I do not; nor how much L. P. Glenn paid. Don't know as I could say I *see* either of them pay anything. Wasn't present when the contract was made; never saw the contract. Don't know of my own knowledge of Geo. O. Talpey and L. P. Glenn making any contract for these cattle."

59 Plaintiffs, by their attorneys, then asked the witness: "After leaving Chamberlin's in January, 1870, and before going to Leavenworth, didn't you make an arrangement with your brother, Geo. O. Talpey, to go to Texas after cattle?"

The witness answered as follows: "The subject never was mentioned in any way before we left the county; may have had such a conversation; not that I know of."

Plaintiffs, by their attorneys, then asked the witness: "Prior to your brother going to Leavenworth with you, in what occupation had he been engaged?

The witness answered as follows: "For a part of the time he had been connected with the legislature in some way, but what it was I don't know. Not as a member I am satisfied. Can't state whether as clerk. No opinion. Can't state how long he worked in the legislature. No idea. I wasn't there during the time. Can't state what exactly he had been doing before that. He had been in the post-office at Larimer City. Think not as postmaster. Don't know in what capacity. He had resided in Wyoming probably two years or more before going down there with us. Can't state how long he was in the post-office. Have no idea. Knew he was in there more than two months, probably, and not two years. He was engaged with Mr. Abbott, but I don't know

60 in what capacity."

Plaintiffs, by their attorneys, then asked the witness: "At the time you were in Leavenworth, in the spring of 1870, before starting to Texas, how much money did you have with you?"

The witness answered as follows: "Can't state; a small amount."

Witness testified, in answer to question propounded by plaintiff counsel, as follows: "I am acquainted with Mr. M. Thompson, who lived in Cheyenne, formerly in Larimer; don't know as his name is M. W.; never been in partnership with him."

Plaintiffs, by their attorneys, then asked the witness the following question: "On or about the time of your return to Colorado, in September, 1870, did you not have a conversation with that Mr. Thompson about that herd?"

(To the asking of which question the said interpleading claimants, by their attorneys, objected on the ground that no time was fixed, and

that the conversation of this man, before this suit was brought, was not competent unless claimant was present. The plaintiffs, by
61 their attorneys, stated the object of the question was to show a conversation between the witness and Thompson, in which witness told Thompson that he (witness) was the owner of cattle and doing business in his brother's name. The court sustained the objection; to which ruling of the court the said plaintiffs, by their attorneys, then and there excepted.)

The witness then testified as follows: "When I was in Larimer City, in the fall of 1869, I believe I met Mr. Thompson there."

Plaintiffs, by their attorneys, then asked the witness: "What month in the fall of 1869, were you in Larimer City?"

The witness answered as follows: "I can't state. I was in the town several times, I am positive. I think that I was there in the fall; don't know but what I was there in December; think probably I was there in November; don't know it; can't state if I was there in September."

Plaintiffs, by their attorneys, then asked the witness as follows: "Did you not, in September, 1869, at Larimer City, Wyoming Ty, have
62 a conversation with Mr. Thompson respecting the purchase of these cattle; and, if so, did you not, in that conversation, state to Mr. Thompson that you were doing business in your brother's name, and that he and you were going south to purchase cattle?"

The witness answered as follows: "I never had any conversation with Mr. Thompson at Larimer City, or any other point, regarding the purchase of cattle or any other property."

The witness was then asked the following question: "Did you not, in September, 1869, at Larimer City, Wyoming Ty, tell Mr. Thompson that you was doing business in your brother's name?"

The witness answered as follows: "I never made such a statement to Mr. Thompson in my life."

The witness was then asked the following question: "Did you not write a letter to Mr. Thompson, in May, 1870, on your way to Texas, in which you told him that you were going to Texas to buy cattle, and on your return you would be able to settle your indebtedness with him?"

(To which question the interpleading claimants, by their attorneys, objected on the ground that the letter is the best evidence; which ob-
63 jection was sustained by the court, and to which ruling of the court the plaintiffs, by their attorneys, then and there excepted.)

The witness was then asked the following question: "Did you not, in the last of November, 1870, after the trial in the bankruptcy-case of which you speak, have, at Denver, a conversation with M. Thompson, in which you told him that you had money invested in these cattle, and that the attorneys had failed to ask you the proper question when you was on the stand, and for that reason didn't get the fact out of you?"

The witness answered as follows: "I never met Mr. Thompson in Denver in my life."

The witness was then asked the following question: "Did you not have conversation with M. Thompson, about the last of November, 1870, in front of the News printing-office, in Denver?"

The witness answered as follows: "I left Denver, I think, about 8th of November, after the bankruptcy-suit, and never returned until this time, and, to the best of my recollection and belief, I never met M. Thompson in Denver in my life. I say positively I never had such a conversation with Thompson; positively that I had not such a conversation in front of News office in Denver at time specified;

64 met Thompson in Greeley; think it was early part of November, 1869; had a short conversation with him, perhaps, on the street; think that was early part of November, 1869. The bankruptcy case was finished here along in early part of November; day I can't state. I went from here to Greeley, and havn't been in Denver since till 17th of the present month. I met Thompson in Greeley; may have had a conversation with him; don't recollect that I had ever in the world on any subject."

The witness was then asked the following question: "Did you not, in November, 1870, at the town of Greeley, have a conversation with M. Thompson, in which you told him that you had an interest in these cattle, but that the attorneys had failed to ask you the proper questions, and consequently did not get it out of you?"

The witness answered as follows: "I did not—never in my life—there or elsewhere. I didn't, on yesterday, fix the day of my arrival at Greeley with herd. It probably was about from 1st to the 10th of September, 1870, to the best of my understanding now; don't think I remained there only over night. I stopped at a hotel; don't recollect the then name of it; it's called the Greeley House now."

65 The witness was then asked the following question: "Did you not, just prior to starting south with your brother, in April, 1870, negotiate a draft for several thousand dollars, at a bank in Leavenworth City?"

The witness answered as follows: "I havn't negotiated a draft for three years, at any place in the United States, for a dollar, more or less."

The witness was then asked the following question: "Do you not know that Oliver S. Glenn, just prior to starting south, in April, 1870, negotiated a draft for some three or four thousand dollars, or more, at a bank in Leavenworth City?"

The witness answered the question as follows: "So far as I know, Mr. Glenn was as poor as I was. He never, to my knowledge, negotiated a draft, except one for $83, returned to W. S. Taylor, at La Porte, Colorado—money he had drawn, he told me, to go to Leavenworth."

The witness was then asked the following question: "Did you not, just prior to going south, in April, 1870, sell some U. S. bonds for *cost* at one of the banks in Leavenworth, Kansas?"

The witness answered as follows: "I never owned a U. S. bond in my life, or negotiated for the purchase or sale of one."

66 The witness was then asked the following question: "Did not Oliver S. Glenn, just prior to starting south, in April, 1870, sell for cash certain U. S. bonds in Leavenworth, Kansas?"

The witness answered as follows: "To the best of my knowledge and belief he didn't."

The witness was then asked the following question: "Did not you & Mr. Oliver S. Glenn, or either of you, directly, or through others, negotiate notes, drafts, or other securities, in Leavenworth, in *in* the spring of 1870, by which you raised money?"

The witness answered the question as follows: "I never, myself, or through any other party, negotiated a draft, note, or any other security for the last 22 years, at Leavenworth, or any other point. So far as I know, O. S. Glenn didn't, directly or indirectly, in any shape or manner."

The witness then testified as follows: "On the way up from Colorado to Texas, the little fund belonging to the concern was handled by the parties owning the herd, L. T. Glenn & Geo. O. Talpey. I never handled any of it, or paid any of the bills."

67 The witness was then asked the following question: "Lockhart T. Glenn & Geo. O. Talpey were in partnership in these cattle, were they?"

The witness answered the question as follows: "That's my understanding."

The witness was then asked the following question: "Had an equal interest?"

The witness answered the question as follows: "That was my understanding. Think the cattle were paid for in gold."

The witness was then asked the following question: "Was the gold with which these cattle were purchased obtained in Texas, or elsewhere?"

The witness answered the question as follows, to wit: "To the best of my knowledge it was purchased in Leavenworth. I wasn't present when it was purchased. Don't think I ever saw it after we started, or at the time. Don't know the denomination or how it was carried, in sacks or otherwise."

The witness was then asked the following question: "How long prior to June, 1868, had you been associated with O. S. Glenn as a partner?"

The witness answered the question as follows: "Can't state precisely; between one and two years."

68 The witness was then asked the following question: "Where was you from the time you dissolved, in June, 1868, till Jan'y, 1870?"

The witness answered the question as follows: "Can't state positively; most of the time in Wyoming Territory. Don't recollect where in particular. I was frequently in Cheyenne and Larimer. Don't know as I was there most time. When not there I was in Benton and different points along the line of railroad—not positive as to time or place. Not positive that during that time I was in those places. Think I was. May have been in other parts of Wyoming during that time for all I recollect. I have no recollection of meeting O. S. Glenn from June 9th, 1868, till I came to Colorado, in 1870, but once. Don't think he was ever up there but once; then I met him. Think it was at Railroad Hotel in Larimer City. Can't state what time that was. Met him as he was going into hotel to get a meal. We dissolved our partnership because parties prosecuting this suit levied an attachment on us and robbed us of everything in the world, & then instituted a bankruptcy proceeding against us. That suit was in Wyoming, (or Dakota, as it was then,) at Cheyenne. The firm of Glenn & Talpey were doing business at Cheyenne at that time. We were also doing business at

69 La Porte, in this Territory, at that time; were merchandizing. Never was connected with our business but little. Was in outside business, and am almost ignorant of our business. The invoice of our stock at Cheyenne was made by the sheriff. Don't know as I ever heard the amount."

The witness was then asked the following question: "How much capital did you have invested in that firm?"

The witness then answered the question as follows: "I have no idea of the amount that I had invested in the business. Every dollar that I owned or controlled was in that firm. Havn't the remotest idea of the amount. We had no ready money; everything was in goods. Havn't the remotest idea of the value of the goods. The assets of the firm in Cheyenne would, I think, amount to a great deal more than that if Doane & Co. had not defrauded us. I would suppose we had about

64 met Thompson in Greeley; think it was early part of November, 1869; had a short conversation with him, perhaps, on the street; think that was early part of November, 1869. The bankruptcy case was finished here along in early part of November; day I can't state. I went from here to Greeley, and havn't been in Denver since till 17th of the present month. I met Thompson in Greeley; may have had a conversation with him; don't recollect that I had ever in the world on any subject."

The witness was then asked the following question: "Did you not, in November, 1870, at the town of Greeley, have a conversation with M. Thompson, in which you told him that you had an interest in these cattle, but that the attorneys had failed to ask you the proper questions, and consequently did not get it out of you?"

The witness answered as follows: "I did not—never in my life—there or elsewhere. I didn't, on yesterday, fix the day of my arrival at Greeley with herd. It probably was about from 1st to the 10th of September, 1870, to the best of my understanding now; don't think I remained there only over night. I stopped at a hotel; don't recollect the then name of it; it's called the Greeley House now."

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The witness was then asked the following question: "Did not you & Mr. Oliver S. Glenn, or either of you, directly, or through others, negotiate notes, drafts, or other securities, in Leavenworth, in *in* the spring of 1870, by which you raised money?"

The witness answered the question as follows: "I never, myself, or through any other party, negotiated a draft, note, or any other security for the last 22 years, at Leavenworth, or any other point. So far as I know, O. S. Glenn didn't, directly or indirectly, in any shape or manner."

The witness then testified as follows: "On the way up from Colorado to Texas, the little fund belonging to the concern was handled by the parties owning the herd, L. T. Glenn & Geo. O. Talpey. I never handled any of it, or paid any of the bills."

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The witness answered the question as follows: "That's my understanding."

The witness was then asked the following question: "Had an equal interest?"

The witness answered the question as follows: "That was my understanding. Think the cattle were paid for in gold."

The witness was then asked the following question: "Was the gold with which these cattle were purchased obtained in Texas, or elsewhere?"

The witness answered the question as follows, to wit: "To the best of my knowledge it was purchased in Leavenworth. I wasn't present when it was purchased. Don't think I ever saw it after we started, or at the time. Don't know the denomination or how it was carried, in sacks or otherwise."

The witness was then asked the following question: "How long prior to June, 1868, had you been associated with O. S. Glenn as a partner?"

The witness answered the question as follows: "Can't state precisely; between one and two years."

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The witness answered the question as follows: "Can't state positively; most of the time in Wyoming Territory. Don't recollect where in particular. I was frequently in Cheyenne and Larimer. Don't know as I was there most time. When not there I was in Benton and different points along the line of railroad—not positive as to time or place. Not positive that during that time I was in those places. Think I was. May have been in other parts of Wyoming during that time for all I recollect. I have no recollection of meeting O. S. Glenn from June 9th, 1868, till I came to Colorado, in 1870, but once. Don't think he was ever up there but once; then I met him. Think it was at Railroad Hotel in Larimer City. Can't state what time that was. Met him as he was going into hotel to get a meal. We dissolved our partnership because parties prosecuting this suit levied an attachment on us and robbed us of everything in the world, & then instituted a bankruptcy proceeding against us. That suit was in Wyoming, (or Dakota, as it was then,) at Cheyenne. The firm of Glenn & Talpey were doing business at Cheyenne at that time. We were also doing business at

69 La Porte, in this Territory, at that time; were merchandizing. Never was connected with our business but little. Was in outside business, and am almost ignorant of our business. The invoice of our stock at Cheyenne was made by the sheriff. Don't know as I ever heard the amount."

The witness was then asked the following question: "How much capital did you have invested in that firm?"

The witness then answered the question as follows: "I have no idea of the amount that I had invested in the business. Every dollar that I owned or controlled was in that firm. Havn't the remotest idea of the amount. We had no ready money; everything was in goods. Havn't the remotest idea of the value of the goods. The assets of the firm in Cheyenne would, I think, amount to a great deal more than that if Doane & Co. had not defrauded us. I would suppose we had about

fifty thousand dollars, probably not that much, in Cheyenne. My judgment is of very little account on that. My opinion is we had twenty or twenty-five thousand in Cheyenne. The assets in La Porte were very little; the amount I don't know. I wasn't at La Porte for more than a year, I guess, before the attachment was levied."

70 The witness was then asked the following question: "State, as near as you can, the amount of the assets of the firm at La Porte."

The witness then answered as follows: "To the best of my information I would think the stock at La Porte would have invoiced three thousand dollars. Would suppose the entire thing, realty & money, would be worth from seven to eight thousand dollars. I have a very poor opinion about it, not being acquainted with the business, and not being there at all. My understanding is the assets were attached, and also taken in bankruptcy. The assets of the firm at La Porte had been sold before the attachment was ever levied. I can't state how long prior to the attachment these goods were sold. I have no idea. I don't know whether it was about thirty days prior to the attachment or not. The suspension of our business happened on the levy of the attachment."

Question. "Did you not state, in your testimony in the bankruptcy-case, that the sale of the assets *of the assets* of the firm in La Porte was about 30 days prior to the suspension of the firm of Glenn & Talpey?"

71 Answer. "I may and may not. Have no recollection of it. That sale was to J. W. Hanna, I think. Have no recollection whether it was more than 30 days before our suspension. The sale was made by my partner. I was not on the ground. I think it was not six months before our suspension. It may have been three months. I can't state the time between the attachment and the bankruptcy suit. It may have been fifteen days or forty-five days. The sale, I would suppose, was long before the attachment. I have no recollection whether it was 30 days or 90 days before the attachment. I don't know what the consideration of the sale to Hanna was."

The witness was then asked the following question: "Did you not state in your testimony in the bankruptcy case that you thought the consideration of that sale to Hanna was fifteen thousand dollars?"

Answer of witness: "I have no such recollection. Don't say I didn't swear to it. I don't know that the consideration was fifteen thousand dollars, or thereabouts. I am ignorant of the sale. That sale was of the entire assets, the store and our real estate. I am acquainted with Mr. Meldrum, near La Porte; there are three of them. Don't know that either of them ever acted as clerk for Mason; neither of them ever clerked for us."

72 The witness was then asked the following question: "Did you not, on or about the time of the suspension of the firm of Glenn & Talpey, on the 9th of June, 1868, at Cheyenne, show to Norman Meldrum a certificate of deposit, in your favor, on a St. Louis bank, for the sum of thirty-five thousand dollars?"

The witness answered the question as follows: "I don't think that I met Mr. Meldrum for several months before or after our suspension. I never owned or exhibited a certificate of deposit on St. Louis, or elsewhere, for one dollar, more or less."

The witness was then asked the following question: "Did not you, on or about the time of your suspension, in June, 1868, at Cheyenne, show

to Mr. Meldrum a draft, in your favor, on a St. Louis bank, for thirty-five thousand dollars?"

The witness answered as follows: "I never owned such a draft for that amount or any other on St. Louis, or elsewhere, and never exhibited one to Meldrum."

The witness was then asked the following question: "Did not the firm of Glenn & Talpey have a large amount of money, or other assets, that were not attached or seized in the bankruptcy proceeding in Wyoming?"

73 Answer of witness: "We hadn't a dollar either in money or property; every particle of property we had was attached. Every bank was garnisheed; never from that day to this have we received one dollar from the business."

Here the plaintiffs' attorney propounded to the witness the following question: "Did you not, in July, 1868, shortly after the attachment of which you speak was levied at Cheyenne, in the banking-room of the bank of Rogers & Company, say to Jos. Mason that he needn't be uneasy about the indebtedness of the firm of Glenn & Talpey to him; that you, meaning the firm of Glenn & Talpey, had plenty of money to pay him and all your other creditors?"

To which the witness responded as follows: "I never made such a statement. I recollect of meeting Mr. Mason in the bank shortly after the attachment. Had a conversation with him about the attachment. Stated to him we were endeavoring to make a compromise, and continue business, and I had every reason to believe at the time we would be able to do so. Mason & Co., like other creditors, were looking after their dues. We owed them nothing. There was a standing account of

74 several years run. The books will show that the balance was the other way. He didn't claim we owed them anything. I said that as soon as this compromise was effected *that* the account would be straightened."

The witness was then asked the following question: "Did not the firm of Glenn & Talpey, after the attachment in June, 1868, have a large amount of assets, sufficient to support you both for four or five years?"

The witness then answered as follows: "After the attachment was levied I never had a dollar in money but what I borrowed from friends. I will state in answer to the question that there wasn't a dollar; not a cent."

The witness was then asked the following question: "Did you not, shortly after the levy of the attachment on the 9th of June, A. D. 1868, at Cheyenne, in the banking-house of Rogers & Co., say to Joseph Mason that you and Oliver S. Glenn had money enough to afford to go out of business for four or five years and fight your creditors, who had attached you?"

The witness then answered as follows:

75 Ans. "I never had such a conversation with Mason in my life."

The witness then testified as follows: "I am acquainted with a Mr. Crowley, who lives in Kansas; I have met him; don't know his first name. I met the man I refer to at Abilene, Kansas, on our trip from Texas up to Colorado, in the latter part of July, I think. I had a passing acquaintance with him. Think O. S. Glenn had about the same acquaintance with him that I had. I knew him while he was at Fort Collins in the Army. Don't know that O. S. Glenn was at Fort Collins then. Glenn was in charge of our business in La Porte. My impression is it wasn't while Crowley was at Collins. Glenn was at La Porte in 1867,

backward & forward; he had control of our business. I think I met Crowley at Collins; am not positive. Don't know what year it was. George Talpey was not acquainted with Crowley before the time of meeting him in Abilene, to my knowledge. I can't state whether L. P. Glenn was or not."

The witness was then asked the following question: "Did you and Oliver S. Glenn, or either of *of* you, negotiate a loan from this Mr.
76 Crowley at the time you met him in Abilene, Kansas; &, if so, for how much?"

Ans. "I never conversed with Dr. Crowley regarding a loan; Oliver S. Glenn did not negotiate a loan of him to my knowledge."

The witness was then asked the following question: "Was there a loan negotiated from Mr. Crowley at the time you met him in Abilene, Kansas, by any one connected with that herd of cattle; &, if so, by whom?"

The witness then answered as follows: "Lockhart T. Glenn told me that he had negotiated a loan from Dr. Crowley; for how much I don't know; I am not able to state of my own knowledge."

(On motion of the interpleading claimants the last foregoing answer was stricken out by the court on the ground that it was hearsay; to which ruling of the court the plaintiffs then and there excepted.)

The witness was then asked the following question: "Soon after your arrival in Colorado with these cattle, did you and O. S. Glenn, or either of you, negotiate a loan from one O. S. Boggs; and, if so, for how much?"

The witness then answered as follows:

77 Ans. "I didn't; I can't state what Glenn did; I never talked with Boggs about it."

The witness was then asked the following question: "Did your brother Geo. O. Talpey ever execute to you any power of attorney; and, if so, in whose custody is that power of attorney?"

(To which question the interpleading claimants objected on the ground that the writing was the best evidence—the counsel for the plaintiffs admit that witness has not been served with supbœna to produce the supposed writing—which objection was sustained by the court; to which ruling of the court the plaintiffs then and there excepted.)

The witness was then asked the following question: "Did you brother Geo. O. Talpey ever authorize you in any way to sell and dispose of these cattle?"

The witness answered as follows:

Ans. "He never did in writing or verbally; it was never discussed between us."

The witness was then asked the following question: "At the time of your suspension, June the 9th, 1868, what amount of indebtedness did Glenn and Talpey owe?"

The witness then answered as follows: "I don't know: I was employed day and night in a business not connected with the firm, all
78 the time we were in business in Cheyenne. I visited our place of business once a week, perhaps; perhaps not so often; Glenn had entire charge; I never informed myself of the amount of the debts of the firm; I have no idea of the amount of the debts of the firm; I don't know that the firm was indebted; since the attachment every thing passed into the sheriff's hands, books, accounts, and goods, and I have had no means of ascertaining the assets or liabilities; I was acting for Wells, Fargo & Co., in the express-business."

The witness was then asked the following question: "Did you not, in your testimony in the bankruptcy-case, in Denver, testify that the in-

debtedness of Glenn & Talpey at the time of their suspension was about $30,000?"

Answer. "I have no recollection of making such a statement; I may have done so—may have said—I suppose we owed $30,000; this is a rough estimate."

Here the witness desires to correct his testimony, and, being permitted, stated as follows:

"I testified as to my whereabouts in certain years, whether in Colorado or Wyoming; I believe I stated that I thought I was not in Colorado during 1869; I am satisfied now I was in the Territory in
79 1869; I think I was in Colorado in the month of September, probably two or three days; I was at Fort Collins, and perhaps at La Porte; I can't state; I came from Cheyenne by coach; the coach-line then ran through La Porte; I was in La Porte."

The witness was then asked the following question: "Did you meet Oliver S. Glenn at that time?"

The witness answered as follows: "To the best of my recollection I didn't see him; it is my impression that he was then in Central; I didn't to my knowledge meet him at Mr. Chamberlin's in La Porte."

Cross-examination closed.

Re-examination:

The witness was asked the following question: "What interest, if any, have you in the property now in controversy?"

(To which question the plaintiffs objected, which objection was overruled; to which ruling of the court the plaintiffs then and there excepted.)

The witness then answered as follows: "I have no interest in it, directly or indirectly, more or less.

The witness was then asked the following question: "State whether you and Oliver S. Glenn contracted any indebtedness with J. W. Doane & Co. subsequent to June 9th, 1868."

80 Answer. No, sir.

(The plaintiffs moved to strike out the answer to the foregoing question, which motion was sustained by the court; to which ruling of the court the interpleading claimants then and there excepted.)

The witness was then asked the following question: "What did you ever realize from the sale to Hanna of which you testified in your cross-examination?"

(To which question the plaintiffs objected, which objection was overruled by the court; to which ruling of the court the plaintiffs then and there excepted.)

The witness then answered as follows:

Ans. Never a dollar, more or less.

Whereupon the said interpleading claimants closed their direct evidence and rested their case.

The said plaintiffs thereupon, to sustain said issue on their behalf, produced as a witness GEORGE O. TALPEY, who objected to being sworn to give evidence in the trial of said issue, which said objection was overruled by the court, and to which ruling of the court in refusing
81 to sustain said objection the said interpleading claimants, by their attorneys, then and there excepted. Whereupon said witness was duly sworn in said cause and testified as follows:

"I am one of the interpleading claimants in this suit; am a brother of

Rufus E. Talpey; I am in my twenty-second year; I was twenty-one years of age the 7th of last February."

(Whereupon the said plaintiffs, by their attorneys, moved the court to dismiss the interplea, on the ground that George O. Talpey, one of the interpleading claimants, was not of age at the time said plea of interplea was filed, and could not maintain this proceeding in his own name; which said motion was overruled by the court; to which ruling of the court in overruling said motion the said plaintiffs, by their attorneys, then and there excepted; and the witness then testified further, as follows:)

"I lived in Wyoming part of 1868, 1869, part of 1870; I first went to Wyoming in the summer of 1868, I believe; could not state the month; I first went to Cheyenne, remained there only two or three days on my first arrival there; then I went to Laramie City; remained in Laramie about a year, perhaps more; was clerking for H. H. Rich-
82 ards first, about two months I believe; not positive; next I clerked for Mr. Abbott; all the balance of the time I was in Laramie, except a very short time before I left here; was employed by the month."

The said plaintiffs then asked of said witness this question: "How much wages did you get per month?"

And the witness answered: "One hundred dollars. The same from Mr. Abbott part of the time, and part of the time seventy-five dollars per month and board."

The examination of this witness was then suspended for the time being, and O. S. Boggs, a witness on behalf of the plaintiffs, duly sworn, and who testified as follows:

I reside in Larimer County, Colorado; know Lockhart T. Glenn, George O. Talpey, R. E. Talpey, and O. S. Glenn.

The plaintiffs then asked said witness the following question: "State if on or about the month of September, A. D. 1870, you had any business negotiations with Oliver S. Glenn and Rufus E. Talpey, or either of them; and, if so, what?"

And the witness answered as follows: "I did in September with O. S. Glenn; I met Capt. Glenn at La Porte on the day of election
83 and shook hands; hadn't seen him for twelve months; he said he was going to the store to get some mail; he came to my house that evening, and staid about a week; next morning he asked me if I had eighteen hundred dollars I could loan to his brother and George O. Talpey; I rode *at* several times to borrow it; couldn't do it; told Capt. Glenn of my failure; he asked me if I could not borrow it at bank; said boys needed money, but could get along with four hundred to five hundred dollars; I borrowed some money then after that at the bank; when I say Capt. Glenn, I mean Oliver S. Glenn."

The plaintiffs then, by their attorneys, asked said witness the following question: "Did O. S. Glenn, at the time he first proposed to negotiate this loan, indicate to you who' it was for? If so, for whom did he say he was negotiating?"

And the witness answered as follows: "He put the question in these words, as near as I can remember, 'Boggs, my brother, and George Talpey have just come into the Territory with a herd of cattle. They are down south of Platte. They are strangers, and requested me to
84 come up and see if I couldn't raise a little money for them.' I let them have three hundred and fifty dollars at two per cent. I paid it to Lockhart T. Glenn. One hundred dollars he told me to lay on the table for O. S. Glenn; don't know as he took the one hundred dollars. I believe he did."

The plaintiffs then asked the witness this question: "Did Oliver S. Glenn, on the morning of his arrest by the deputy United States marshal in the bankruptcy-case last fall, leave any paper at your house?"

And the witness answered: "Not to my knowledge. I never saw a paper that he left then, that I know of."

On the cross-examination of this witness by the attorneys for the interpleading claimants, this witness testified as follows:

"I came here as a witness because subpœnaed by sheriff of Larimer County; have seen Mr. Elbert at F't Collins within six or seven days; conversed with him about this case; was in conversation with him three or four hours; can't say but what he did hold out some inducements to me to come down and testify in this cause. I told him I didn't think anything I had said would be of benefit. He said, in reply, that, 85 in a laughing way, 'Oh, well; a drowning man will catch at straws,' or something like that. He merely advised me to put my claim in with Dr. Crowley, and said Glenn and Talpey were damned scoundrels. I believe he spoke of attaching stock in sheriff's hands in Weld County, and as much as said I would never get my money. I said they had never done me any harm. I had soldiered with them, and felt kindly to them. O. S. Glenn and myself have always been the best of friends. Talpey and I have been very little together. As to the one hundred dollars, L. T. Glenn did not tell me to pay it to O. S. Glenn for any special purpose; believe O. S. Glenn said he sent the money to his wife."

On the re-examination of this witness by Mr. Elbert, he testified as follows:

"You (Mr. Elbert) said Glenn and Talpey were damned scoundrels; believe you said, 'drowning men catch at straws,' or something like that?"

The examination of the witness GEORGE O. TALPEY was then resumed, as follows:

"From Laramie I went to Cheyenne; remained there three or four months, I believe; engaged in clerking in the house of representatives two months, at the rate of ten dollars per day, in Territorial scrip. 86 I don't remember what it (Territorial scrip) was worth, per dollar, at that time. I don't remember exactly what I sold it for; believe it was seventy cents on the dollar. After clerking in the house of representatives, I went to Missourri. I think it was the latter part of January, or first of February. I went with my brother to Leavenworth; had not at that time arranged to go to Texas."

The said plaintiffs, by their attorneys, then asked said witness the following question: "How long prior to starting south, in April, A. D. 1870, had you been stopping in Leavenworth, Kansas?"

And the witness answered: "About two or three days, I believe. I was not more than three or four days any way. I first met Lockhart P. Glenn in Leavenworth. I think I met him in Leavenworth when I had been there once before on a visit to Missourri; think I met him then. This was a few days before I came back there and started for Texas."

The plaintiffs then asked said witness this question: "Had you never met young Glenn prior to this first time?"

And the witness answered as follows: "I had a week's acquaintance with L. T. Glenn, more or less, before starting. I was in Leaven- 87 worth first, on my way home, two or three days, and then once again, before starting, for two or three days."

The plaintiffs then asked said witness the following question: "How much money, if any, did you have prior to starting south?"

And the witness answered: "About twenty-seven hundred dollars, I believe, in currency."

The plaintiffs then asked said witness the following question: "Where did you get this twenty-seven hundred dollars?"

And the said witness answered: "I got the twenty-seven hundred dollars in various ways; worked for part of it; part of it I got from my mother; I worked for part of it, probably a little more than half, or about half. I accumulated that money by all the work I ever had done during my life."

The said plaintiffs then asked said witness this question: "Did you accumulate any of that money while in the Territory of Wyoming?"

And the witness answered: "I did, sir; probably twelve or fifteen hundred dollars, more or less. That was during the time I was clerking. I think I got one thousand to twelve hundred dollars of my mother; did not get it all at one time; don't know at how many different times I got it."

88 The said plaintiffs then asked said witness this question: "Was it at three different times?"

And the said witness answered: "Probably it was, and probably more."

The said plaintiffs then asked said witness the following question: "At what time was the first instalment paid or remitted to you by your mother?"

And the witness answered: "I don't remember when it was. It was prior to my coming to Cheyenne."

Question. "Was all that money got from your mother prior to your coming to Wyoming Territory?"

And said witness answered: "I did, sir."

Question. "How long prior to your coming to Wyoming did you get the first of it?"

And the witness answered as follows: "Some time—I don't remember how long. I think probably a year, and from that time to the time I left she gave me the balance."

Question. "Fix, as near as you can, the number of instalments in which this was paid."

And the witness answered as follows: "I can't do it."

Question. "Do you know of your mother about that time you received that money having received money from your brother, R. E. Talpey?"

And the witness answered as follows: "No, sir."

89 Question. "Don't you know of your mother having received money from your brother, R. E. Talpey?"

And the witness answered as follows: "Yes, sir; don't know that I ever *seen* it; have heard my mother say she had received money from Ed."

Question. "Was the money which your mother paid you, money which she had received from Rufus E. Talpey?"

And the witness answered as follows: "Not to my knowledge."

Question. "Did you not swear in your testimony in the bankruptcy-case trial in Denver, last fall, that this money which she gave you might have been sent by your brother, Rufus E. Talpey?"

(To which said question the said interpleading claimants objected, and which said objection was sustained by the court; to which said ruling of the court in sustaining said objection the said plaintiffs, by their attorneys, then and there excepted.)

Question. "During your residence in Wyoming about how much did you pay per week for board?"

Which said question was answered as follows: "About eight dollars, I believe, most of the time. It was in the fall of 1869, I clerked in the legislature for sixty days. I said I got one thousand to twelve hundred dollars from my mother before going to Cheyenne; brought it
90 with me. I had some I had earned in Missouri; probably three or four hundred dollars. When I received the money from my mother I was living in Missouri."

The said plaintiffs then asked said witness this question: "Is your mother a lady of fortune?"

And the witness answered as follows: "I can't say as to amount of fortune; I don't know as she is a lady of wealth; she probably has some money; I don't know any more about it than you do.

Question. "Is she worth one thousand dollars?"

And the witness answered as follows: "Very likely she is."

Question. "Is she worth two thousand dollars?"

And the witness answered as follows: "Probably she is worth several thousand dollars. I used part of the money in Wyoming."

Question. "In what way?"

And the witness answered as follows: "I loaned part of it at various times."

Question. "How much?"

Answer. "I couldn't state; probably fifty or one hundred dollars at different times to different parties; probably more than that. I believe I was in Wyoming about eighteen months. I first met Oliver S. Glenn in Laramie City in 1869. Havn't the least idea of the season;
91 was in and addressed a letter and went out; that was the first time I met him; made his acquaintance; don't think I saw him then again in Laramie City. Rufus E. Talpey wasn't there at that time."

Question. "Did you ever receive any money, directly or indirectly, from your brother, Rufus E. Talpey?"

Answer. "I never did."

Question. "Did not Rufus E. Talpey pay you money on or about the first of April, A. D. 1870, in Leavenworth?"

And the witness answered as follows: "He did not; don't think I ever received any from him."

Question. "Did Oliver S. Glenn ever pay you any money, directly or indirectly?"

And the witness answered as follows: "He never did."

Question. "Did not Oliver S. Glenn, in person or through another, pay you money in the city of Leavenworth, some time in the spring of 1870, prior to your going to Texas?"

And the witness answered as follows: "He never did; don't think I ever saw Oliver S. Glenn in Leavenworth in my life. I was in Leavenworth three or four days before starting south; I met him about sixteen miles from Leavenworth."

Question. "Did O. S. Glenn ever transfer to you or give to you a certificate of deposit, draft, U. S. bonds, or any thing else by which you could realize money?"

92 And the witness answered as follows: "He never did in his life."

Question. "Did Rufus E. Talpey?"

And the witness answered as follows: "Never in the world, that I remember of."

Question. "Did you meet your brother in Leavenworth on or about the first day of April, 1870, by arrangement?"

Answer. "I think so."

Question. "Did Oliver S. Glenn meet you at this place, sixteen miles out of Leavenworth, by agreement?"

Answer. "There was no arrangement to meet him there or elsewhere."

Question. "Did Lockhart T. Glenn meet you in Leavenworth, in April, A. D. 1870, by arrangement, or was that meeting accidental?"

Answer. "I went on there about the latter part of March or first of April by arrangement."

Question. "When did you make that arrangement?"

Answer. "When I saw him there a few days before; it was the first time that I met him, I think, that I made the arrangement to meet him in Leavenworth. There was no one with him at the time the arrangement was made. My brother introduced me. Mr. O. S. Glenn wasn't there then; when I made the arrangement, nor the time I first met him."

93 Question. "Was your brother, Rufus E. Talpey, at this time you went to Leavenworth together, expecting to meet O. S. Glenn there?"

Answer. "Not that I know of."

Question. Was he expecting to meet Lockhart T. Glenn?

And the witness answered as follows: "Not to my knowledge. Nobody was present when I made this arrangement with L. T. Glenn. Rufus E. Talpey wasn't present. When I went over from my home in Missouri the first time I did not go with the expectation of meeting L. T. Glenn. Don't think we put up at the same hotel; believe I met him at Planters' House first; think that is where my brother introduced me to him; think my brother was at private house.

Question. Was your brother acquainted with L. T. Glenn prior to meeting him in Leavenworth at that time?

Answer. "I can't state." (The witness, correcting, then stated as follows:) On our meeting O. S. Glenn at the place sixteen miles from Leavenworth, there was an arrangement made to meet here at Ft. Scott. I met a Mr. Crowley on our road back with the cattle at Abilene; don't think I had ever met him prior to that; can't say whether L. T. Glenn had ever met Crowley or not; I don't know.

94 Question. Did not Rufus E. Talpey and Oliver S. Glenn at that time when you met Crowley in Abilene, Kansas, negotiate a loan from Mr. Crowley of whom you speak?

Answer. They did not to my knowledge; neither of them did to my knowledge; I did not; I don't know of my own knowledge that there was a loan negotiated of Crowley there at that time; did not see the money paid over to any person; I wasn't constantly in employ in Wyoming; was out of employment probably a month or six weeks; think I was in legislature sixty days; think that was exact time; not positive; think I was in Laramie a year, probably more; the rest of the time I was in Cheyenne; I was employed for a time by Mr. Young, and Mr. Jouisse for a time; this was before I left Laramie City; I was in no employment in Cheyenne, except while I was in the legislature; I don't state I was in Laramie just a year; I was in Wyoming about eighteen months; I was in Cheyenne I believe about three months, I think, balance of the time in Laramie; must have been in

Laramie fifteen months; I was employed in legislature before I left Laramie City; the time I was unemployed was after I was in legislature; think the legislature was in session when I went to Cheyenne;
95 think it was fore part of November, A. D. 1869; I started east last of January or first part of February; it was during January I was unemployed; I took the money I earned in Missouri out to Laramie; there was about twelve to fifteen hundred dollars of it altogether. For one person, I loaned money to M. C. Brown; don't remember the amount; Brown lived at Laramie City; think it was about one hundred dollars, probably more; can't say; don't remember for how long. It was a matter of business; think it was loaned two or three months, probably three months; don't remember the names of others; I loaned money to various parties, parties with whom I was not particularly acquainted, and don't remember their names; believe I lent money to my brother on two or three occasions, while I was in Cheyenne—my brother, Rufus E. Talpey; can't fix the time; think I loaned him money while I was in Cheyenne; can't be positive, in 1869 I believe, or fore part of 1870; that was partly business and partly accommodation; think I lent him while there fifty or one hundred dollars, probably more than that; couldn't fix the month, whether November, December, or January; don't remember any other parties to whom I lent money; if I was out of employment at all while in Laramie City, it wasn't more than a week;
96 I arrived in Colorado I think some time between the 8th and fifteenth of September, 1870; think we arrived at Greeley about the tenth or twelfth of September; O. S. Gleen didn't come through with us from Texas; he left us at Abilene and went home; he first met us at Arkansas; met us again at Abilene and went from there home; he went home I believe from Abilene; next met him up on the Cache la Poudre about the 13th or 15th of September; it was but a few days after our arrival in Colorado; believe it was next day after our arrival, near Greeley; we were about two or three miles from Greeley; he came out to the herd; that meeting at the herd was purely accidental; I had no expectation of meeting him there; I was with the herd at the time of its arrival near Greeley; Rufus E. Talpey left herd within two or three miles of Greeley; he was not with the herd when O. S. Glenn came out to meet us.

Question. Where is Oliver S. Glenn at present?

And said witness answered as follows: I can't state positively where he is; he told me in Greeley one day that he was going off in the morning train to China. Rufus E. Talpey since he came to this Territory in September, 1870, has been living on Cache la Poudre; can't
97 say that he has been employed. Think it was some time during March last that Glenn took train at Greeley; before that, and subsequent to September, 1870, he had been on Cache la Poudre. I don't know of Rufus E. Talpey being engaged in any employment since September, 1870; since that I have seen him several times, probably on an average a month or six weeks.

The said plaintiffs then asked said witness the following question: "Don't you know that he hasn't been engaged in any business during that time?"

(To the asking of which said question the said interpleading claimants objected, which said objection was sustained; to which said ruling of the court in sustaining said objection the said plaintiffs, by their attorneys, then and there excepted.)

The said plaintiffs then offered SAMUEL H. ELBERT as a witness in their behalf, who, being duly sworn, testified as follows:

I heard the testimony of the witness Boggs in regard to the conversation between myself and him.

Question. "State whether on the occasion referred to by him you made any improper advance to him whatever."

And the witness answered as follows: "I did not, in any shape or form. I advised him to sue on his note. I told him, in the course of
98 quite a conversation, that these men were scoundrels. I did not tell him they were damned scoundrels. I never said to him that drowning men catch at straws.

The plaintiffs then produced as a witness in their behalf CHARLES S. BLACKINGTON, who, being duly sworn, testified as follows:

"I reside at Ft. Collins at present; about the tenth of September last I was about Greeley to work on an irrigating ditch, about five miles out of town; I am not acquainted with O. S. Glenn or Rufus E. Talpey. I am not acquainted with Lockhart T. Glenn; am not acquainted with George O. Talpey; I met a herd of stock and had a conversation with a man who I supposed to be either one of the Glenns or Talpeys; this talk was between the seventh and tenth of September last; it was about two and a half miles or three miles from Greeley; think I see the man I had the talk with in court, though I could not say for certain; I think it is the young man who sits here, (pointing to George O. Talpey.) That is the man, I think it is, as near as I can tell.

Question. "Point out, if you can, the man in court with whom you had that conversation to the best of your recollection and belief."

99 And the witness answered as follows: (Points to George O. Talpey.) "That is the man to the best of my recollection."

Question. "State what that conversation was."

And the witness answered as follows: "I met this man with a herd of stock. I was talking of buying some stock at the time. I asked him what he would take for fifty or a hundred two or three years old heifers. He told me he had nothing younger than three-year old; that he couldn't tell me what he would take until that afternoon; that his brother owned one-half interest in the stock; they were going to camp up the river that afternoon, to come up there and he could tell; his brother was stopping in Greeley at the time. That is about all the conversation I had with him. This was between the seventh and tenth of September, in two and a half or three miles of Greeley. He was with the herd at the time, just ahead of it. He said his brother owned half interest and was down at Greeley; told me to go up to the herd that afternoon; I did not go. That is all he said about the stock. I asked him when he left. I was thinking of buying a herd of young stock.

Question. "Was that all he said about the ownership of that stock?

And the witness answered: "I think that is all the talk I had with
100 him in regard to stock."

On cross-examination this witness testified as follows:

Don't know but I talked with Mr. Elbert lately about this conversation, when he asked me what I knew about it; talked with him perhaps three or five minutes, not more than five.

Question. In that conversation did Mr. Elbert make use of the word "brother?"

Answer. I don't know that he did; I could not say; I never had a conversation with this gentleman on the Platte. It was two and a half

or three miles from Greeley, near Cache a la Poudre; I swear positively he said his brother had a half interest in that stock; George O. Talpey here in court resemble' the man I talked with; don't swear positively it is him. I went to work on the ditch the 4th of September, and quit the 25th of October the same year. Have not noticed any other herd of cattle no more than the stock that was running about there; none as large as that herd was. There are men driving stock there all the time that are camped there, that is, that live there; men are looking up stock there every day, but not driving herds like this one that I saw; other herds might have gone by in that neighborhood and I not have seen them; couldn't see the road on which I saw this herd from where I was at work.

101 On re-examination, witness testifies as follows:

Question. Did this man in that conversation tell you where that herd was from?

(To which said question the said interpleading complainants objected; which said objection was sustained by the court; to which said ruling of the court in sustaining said objection said plaintiffs, by their attorneys, then and there excepted.)

Said plaintiffs then offered JOHN Q. A. ROLLINS as a witness in their behalf, who was duly sworn and testified as follows:

I resided in Cheyenne in the winter of 1869–1870; was there during the winter months, most of the time December, January, and February; think I was there part of September and November; was there most of the fall. I was engaged in keeping the Rollins House, and had been for some time; was running it for store and office and furnished rooms. I was acquainted with George O. Talpey then; I see him in the room; I knew him during the winter and spring of 1869 and 1870.

Question. "State if you was then acquainted with his pecuniary circumstances."

And the witness answered as follows: I am somewhat acquainted with his pecuniary circumstances from what he told me.

102 Question. State what his pecuniary circumstances at that time were.

And the witness answered as follows: "I didn't consider them good."

Question. What did George O. Talpey say about his then pecuniary condition?

And the witness answered as follows: He rented a room in my house, and when he left he was unable to pay his bill, he told me, and wanted to leave his trunk in security, which he did; the bill has never been paid; he said he was going away and would send it back to a cousin to pay; I have the bill, which is $34 or $35; this was the last of January, A. D. 1870, or about the first of February, or some time in February, A. D. 1870; he was going to Cache a la Poudre from there he told me. This bill was for rent of room and fuel for room occupied by him and another young man.

This witness on cross-examination testified as follows: This young man who occupied the room with him was Stanley; Stanley was not the cousin of Talpey that I know of; don't think Stanley remained after Talpey left; he had paid what part of the bill belonged to him to pay before he left; Talpey assumed this and agreed to pay; it was not just the other way; this trunk was taken out of a room; I don't know who took it out; can't say whether I saw it taken out or not; he took

103 out some letters and burned them, also took some clothing; the

bill was thirty-four or thirty-five dollars; I never received the money; I wrote to him for it once or twice; at the time the trial went off before Charles & Elbert were telling me about this and asked me if George O. Talpey left his trunk; they told me that he had sworn that he was well off, and I wrote to him what I had heard and that if he did not pay the bill I would expose him; I have no feeling in regard to this suit.

The plaintiffs then offered to read in evidence the deposition of James W. Hanna, taken May 29th, A. D. 1871, before William L. English, esq., Cook County, Ills.; to the reading of which said deposition the said interpleading claimants, by their attorneys, objected on the grounds—

1st. Because the parties in suit, John W. Doane, Patrick J. Towle, and John Roper, partners, as J. W. Doane & Co., commission specifies suit of Doane, Towle, Roper, and Raymond are parties, and dated May 8th, A. D. 1871, out of Weld County.

2d. Because deposition is in this cause and not in the interpleader, and does not permit interrogatories to be propounded in behalf of the claimants.

3d. Because there is no authentication of the official character
104 of a notary public.

4th. The commission is to take the deposition of James H. Hanna, and deposition taken is that of J. W. Hanna.

Which said objection to the reading of said deposition to the jury was sustained by the court, and the said court refused to permit said deposition so to be read; to which ruling of the court in excluding said deposition from the jury the said plaintiffs, by their attorneys, then and there excepted; and which said deposition is in the words and figures following, to wit:

TERRITORY OF COLORADO,
Weld County, ss:

The people of the Territory of Colorado to William English, notary public, Chicago, Illinois, greeting:

Whereas it has been represented to us that James H. Hanna is a material witness in a certain cause now pending in our district court for the first judicial district of Colorado Territory in and for the county of Weld, wherein J. W. Doane, P. J. Towle, John Roper, and J. R. Raymond, partners, doing business under the firm name and style of J. W. Doane & Co., are plaintiffs, and Oliver S. Glenn and Rufus E.
105 Talpey are defendants, and George O. Talpey and L. T. Glenn interpleaders, and that the said witness resides at Chicago, Illinois, aforesaid, without the said Territory of Colorado, and that his personal attendance cannot be procured at the trial of the said cause:

Now know ye that we, in confidence of your prudence and fidelity, have appointed, and by these presents do appoint, you commissioner to examine the said witness, and do therefore authorize and require you to cause the said witness to come before you, at such time and place as you may therefor designate and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness, by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories and cross-interrogatories enclosed with or attached to these presents, both on the part of the said plaintiffs and the said defendants, and none others; and the same, when thus taken, together with this commission and the said interrogatories, to certify into our said district court, with the least possible delay.

Witness George H. Mills, clerk of the district court, and the seal thereof, at Evans, in said county and Territory, this eighth day of May, A. D. 1871.

106 { SEAL FIRST DISTRICT COURT OF COLORADO. } GEORGE H. MILLS, *Clerk*, By WELLINGTON J. KRAM, *Deputy Clerk.*

TERRITORY OF COLORADO,
County of Weld, ss:

In the district court of the first judicial district, Territory of Colorado, county of Weld. To the December term, A. D. 1870.

J. W. DOANE, P. J. TOWLE, JOHN ROPER, AND J. R. Raymond, partners, doing business under the firm name and style of J. W. Doane & Co., plaintiffs,
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, defendants, and George O. Talpey and L. T. Glenn, interpleaders.
} Attachment.

The above-named defendants, and the above-named interpleaders are hereby notified that on Monday, the 8th day of May, A. D. 1871, we will sue out of the office of the clerk of the district court of the first judicial district of the county of Weld, Territory of Colorado, a
107 dedimus potestatum, or commission, to be directed to William English, notary public, Chicago, Illinois, a commissioner to take the deposition of James H. Hanna, of said city of Chicago, State of Illinois, to be used in evidence on the trial of the above-entitled cause, now pending and undetermined in the said district court of the said county of Weld, on the common-law side thereof, and that a copy of the interrogatories hereto attached will be appended to said dedimus potestatum, or commission, to be propounded to said witness on the part, and in behalf of, the plaintiffs, and you can file cross-interrogatories, and join in said commission, if you see fit.

CHARLES & ELBERT,
Att'ys for Plaintiffs.

To FRANCE & ROGERS,
Att'ys for Interpleaders and Att'ys for Defendants.

TERRITORY OF COLORADO,
County of Weld, ss:

In the district court of the first judicial district, Territory of Colorado, and county of Weld. To the December term, A. D. 1870.

Interrogatories to be propounded to James H. Hanna, witness,
108 to be produced, sworn, and examined under and by virtue of the dedimus potestatum, or commission, to be issued in pursuance of the annexed notice.

1st. What is your name, age, occupation, and place of residence?

2nd. Do you know the parties plaintiff and defendant in this cause, or either and which of them, and how long have you known them respectively?

3d. Did you ever have any conversation with either of the defendants, Oliver S. Glenn or Rufus E. Talpey, with reference to the ownership of any property, personal or real, in the Territory of Colorado? If so, state with whom the conversation was had, when and where was it, and what was the nature of that conversation. State in full all particulars.

4th. If, in your answer to interrogatory 3d, you state that you had a conversation with either of the defendants concerning the ownership of certain cattle, please state to what cattle the said related, where they were at the time of said conversation, in whose care and custody
109 were they, and how many of them were there.

5th. If, in your answer to interrogatory 4th, you state that the cattle mentioned were held by any legal process, please state in what suit, and where the same is pending, if you know.

6th. Do you know the parties, George O. Talpey or L. T. Glenn, interpleaders in this cause, or either and which of them, and how long have you known them respectively?

7th. Did you ever have any conversation with either of the interpleaders, George O. Talpey or L. T. Glenn, with reference to the ownership of any property, personal or real, in the Territory of Colorado? If so, state with whom the conversation was had, when and where was it, and what was the nature of that conversation. State in full all particulars.

8th. If, in your answer to interrogatory 7th, you state that you had a conversation with either of the interpleaders, George O. Talpey or L. T. Glenn, concerning the ownership of certain cattle, please
110 state to what cattle the said conversation related, where they were at the time of said conversation, in whose care and custody were they, and how many of them were there.

9th. If, in your answer to interrogatory 8th, you state that the cattle mentioned were held by any legal process, please state in what suit, and where the same is pending, if you know.

Lastly. Do you know of any other matter or thing touching the matters in controversy in this cause that may tend to the advantage of the plaintiff in addition to what you have already stated? If yea, state the same as fully and at large as if you had been particularly interrogated in reference thereto.

CHARLES & ELBERT,
Att'ys for Plaintiff.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

L. C. Charles, of lawful age, being first duly sworn, deposes and says, that he served, personally, the foregoing notice to sue out a com-
111 mission to take the deposition of James H. Hanna, a resident of the city of Chicago, Illinois, together with the interrogatories of plaintiffs thereto attached, upon L. B. France and M. A. Rogers, attorneys at law, at their office in the city of Denver, Territory of Colorado, on the 28th day of May, A. D. 1871, by delivering to said France & Rogers, attorneys as aforesaid, and believed to be the attorneys for the said defendants and the said interpleaders in the aforesaid action, a full, true, and correct copy of said notice and interrogatories.

L. C. CHARLES.

Subscribed and sworn to before me this 29th day of April, A. D. 1871.
GEORGE H. MILLS,
Clerk District Court.

The deposition of James W. Hanna, of the county of Cook, and State of Illinois, a witness of lawful age, produced, sworn, and examined upon his corporal oath, on the 29th day of May, A. D. 1871, at my office, 122 La Salle st., in the city of Chicago, in the county of Cook, and State of Illinois aforesaid, by me, W'm J. English, a commissioner duly appointed by a dedimus potestatum, issued out of the clerk's office of the district court of Weld County, in the Territory of
112 Colorado, bearing teste in the name of George H. Mills, esq., clerk of said district court, and the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said James W. Hanna, a witness in a certain suit and matter in controversy, now pending and undetermined in the said district court, wherein J. W. Doane, P. J. Towle, John Roper, and J. R. Raymond, partners, doing business under the firm name and style of J. W. Doane & Co., are plaintiffs, and Oliver S. Glenn and Rufus E. Talpey are defendants, and George O. Talpey and L. T. Glenn interpleaders, in behalf of the said plaintiffs, (there being no cross-interrogatories,) and none others.

The said JAMES W. HANNA, being first duly sworn by me as a witness in the said cause, previous to the commencement of his examination, to testify the truth, as well on the part of the plaintiffs as the defendants, in relation to the matters in controversy between the said plaintiff and defendant, so far as he should be interrogated, testified and deposed as follows:

1st. What is your name, age, occupation, and place of residence?
113 A. James W. Hanna; age, 28; occupation, coal-dealer; residence, Marietta, Ohio.

2d q. Do you know the parties, plaintiff and defendant, in this cause, or either and which of them, and how long have you known them respectively?

A. Both plaintiff and defendant parties I do know; the plaintiffs since March, 1871, and the defendants since the fall of 1863.

3rd int. Did you ever have any conversation with either of the defendants, Oliver S. Glenn or Rufus E. Talpey, with reference to the ownership of any property, personal or real, in the Territory of Colorado? If so, state with whom the conversation was had, when and where was it, and what was the nature of that conversation. State in full all the particulars.

A. I had such conversation with Oliver S. Glenn. It was in November or December, 1870, and after the trial of the bankrupt proceeding against Glenn and Talpey in the supreme court of Colorado Territory. Glenn and myself were conversing about the case, near the court-house in Denver, Colorado Territory. We were waiting to
114 hear the decision of the judges on the case, after its trial. Glenn said then that everything he had was in those cattle, and that if the decision went against him he was "broke" and "gone up."

4th int. If, in your answer to interrogatory 3rd, you state that you had a conversation with either of the defendants concerning the ownership of certain cattle, please state to what cattle the said related, where they were at the time of said conversation, in whose care and custody they were, and how many of them were there.

A. The cattle that are now in controversy in this suit, and which same were also in controversy in the bankrupt suit already mentioned. The cattle were in Weld County, Colorado Territory. They were in the

care and custody of the U. S. marshal. The cattle, Glenn and Talpey told me, numbered between eight and nine hundred.

5th int. If, in your answer to interrogatory 4th, you state that the cattle mentioned were held by any legal process, please state in what suit and where the same is pending, if you know.

115 A. I understood that the cattle had been attached in this suit of J. W. Doane & Co. vs. O. S. Glenn and Rufus E. Talpey, and then U. S. marshal in a suit in bankruptcy took them from the sheriff.

6th int. Do you know the parties, George O. Talpey or L. T. Glenn, interpleaders in this cause, or either and which of them; and how long have you known them respectively?

A. I have known both George Talpey and L. T. Glenn since last fall.

7th int. Did you ever have any conversation with either of the interpleaders, George O. Talpey or L. T. Glenn, with reference to the ownership of any property, personal or real, in the Territory of Colorado? If so, state with whom the conversation was had, when and where was it, and what was the nature of that conversation. State in full all the particulars.

A. I had such a conversation with L. T. Glenn. It was after the rendering of the decision in the case above referred to at the Fremont House, Denver, C. T. We were talking about the dissenting judge having abused L. T. Glenn about the testimony he, L. T. Glenn, gave,

116 in his decision. During the conversation I told Glenn that it was the general belief that the cattle belonged to O. S. Glenn and R. E. Talpey. L. T. Glenn then became quite excited, and said he would acknowledge that they did have an interest in the cattle, but that did not give them (meaning the plaintiffs in that case) the right to take away theirs; and if they did take them away he would "whale" Judge Belford.

8th int. If, in answer to interrogatory 7th, you state that you had a conversation with either of the interpleaders, George O. Talpey or L. T. Glenn, concerning the ownership of certain cattle, please state to what cattle said conversation related, where they were at the time of said conversation, in whose custody and care were they, and how many of them were there.

A. The conversation was in reference to the same cattle as in my conversation with Oliver S. Glenn, above mentioned, and were still in the custody of the U. S. marshal.

9th int. If, in your answer to interrogatory 8th, you state that the cattle mentioned were held by any legal process, please state in

117 what suit and where the same is pending, if you know.

A. They were held, I understand, in the suit in bankruptcy against Oliver S. Glenn and R. E. Talpey, pending in the supreme court, and they had also been attached in this suit of Doane & Co. vs. Glenn and Talpey.

10th int. Do you know of any other matter or thing touching the matters in controversy in this cause that may tend to the advantage of the plaintiff, in addition to what you have already stated? If yea, state the same as fully as if you had been particularly interrogated in reference thereto.

A. I know nothing farther.

JAMES W. HANNA.

Subscribed and sworn to before me this 29th day of May, 1871.

W'M J. ENGLISH,
Notary Public.

I, William J. English, of the county of Cook and State of Illinois, a commissioner duly appointed to take the deposition of the said
118 James W. Hanna, a witness, whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said James W. Hanna as a witness in said suit between the said J. W. Doane, P. J. Towle, John Roper, and J. R. Raymond, plaintiffs, and Oliver S. Glenn and Rufus E. Talpey are defendants, he was duly sworn by me to testify the truth in relation to the matters in controversy between the said parties, so far as he should be interrogated concerning the same; that the said deposition was taken by me, and reduced to writing by me at my office in the city of Chicago, in the county of Cook and State of Illinois, on the 29th day of May, A. D. 1871, and that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto were read over to the said witness, and that thereupon the same were signed and sworn to by the said deponent, James W. Hanna, before me at the place and on the day and year last aforesaid.

[NOTARIAL SEAL.] W'M J. ENGLISH,
Commissioner.

(Endorsed:) Doane v. Glenn & Talpey. Deposition of James W Hanna. Opened, published, and filed July 5th, A. D. 1871, by order of court. G. H. Mills, clerk.

119 The witness LOCKHART T. GLENN was thereupon sworn, and testified as follows:

I am one of the parties to this suit. I resided in the year 1869 in Ohio, Highland County. Was in Cincinnati the latter part of 1869. Came to Colorado first about the 1st of September, 1870, in company with Geo. O. Talpey and some herders we had with us.

Left Ohio about the 20th of March, 1870, in company with O. S. Glenn. O. S. Glenn is my brother, older than myself. He is about 31 years of age. I am 26 in September next. I came from Ohio to Leavenworth, Kansas. Arrived in Leavenworth about the 25th of March, I believe. Don't recollect the exact date. I remained there until about the 2nd day of April. My brother, O. S., went with me. He was in the country, but not in Leavenworth, while I was there. He left the city a day or two after I got there. I first became acquainted with George O. Talpey about the last of March, 1870, in Leavenworth. I first got acquainted with Rufus E. Talpey about the same time. I had never met either of them before that, nor had any correspondence with either of them before that. My meeting with George O. Talpey in Leavenworth in March, 1870, was by accident so far as I was concerned.

120 Was it by design on the part of others?

The witness then answered the question as follows: Not that I am aware of. The meeting with R. E. Talpey was by accident. I had no expectation of meeting George O. Talpey there when I went there, nor Rufus E. Talpey. I don't know what my brother, O. S. Glenn, expected about this. I never heard him say. Never heard him say that he expected to meet R. E. Talpey there in March, 1870. Oliver S. Glenn had been at home in Ohio some two or three weeks, I believe, before starting for Leavenworth. During the time I was in Leavenworth, before starting to Texas, George O. Talpey was there with me three or four days, more or less. I think he was there a day, or perhaps two or three days, when I first met him, and

then, I think, he went to Missouri and came back, and, I think, was there a day or two. He was absent, I think, two or three days after leaving for Missouri before he returned to Leavenworth. I don't know whether he was in Leavenworth when I got there. Didn't meet him on the day of my arrival. Believe I met him the next day about that time.

I and George O. Talpey went to Texas together. We started from Leavenworth April 2nd. Rufus E. Talpey was with us.

121 I came to an agreement with Geo. O. Talpey to go to Texas for cattle during the time I was in Leavenworth.

The following question was then asked the witness by the attorney for the plaintiffs: "On what one of the days you were in Leavenworth did you come to this agreement or understanding?"

The witness then answered, as follows: I don't recollect the exact day; it was before he left for Missouri, I believe. It was on the occasion that he was in Leavenworth the first time of which I speak. I don't recollect positively when I first met Geo. O. Talpey. It may have been at the Planters'. I believe it was. Rufus E. Talpey introduced me. I don't know whether Oliver S. Glenn was present there or not. I am not positive whether he (O. S. Glenn) had gone to the country prior to then or not. We were not all stopping at the same hotel. I believe that I was informed by my brother that these gentlemen (the Talpeys) were in Leavenworth. The meeting in the Planters' House was my first meeting with George O. Talpey. I believe I had met Rufus E. Talpey before somewhere in Leavenworth; where I don't recollect, nor

122 whether it was on that day or not. I am not positive whether I met R. E. Talpey on the day of my arrival. My brother introduced me to Rufus E. Talpey. Oliver S. Glenn went part of the way to Texas with us from Fort Scott, Kansas. He joined us there. We met him before that about 16 miles south of Leavenworth. That meeting was rather accidental. The meeting at Fort Scott was by previous arrangement made in Leavenworth some time before we started south, during the seven days I was in Leavenworth. I left Ohio about the 20th of March. At that time I had an arrangement with Oliver S. Glenn to go to Texas with him. After we got to Leavenworth I made another arrangement with him. I had been living in Ohio for several years prior to the 20th of March, 1870; was born and raised there. Hadn't lived there all of the time; was out of the State frequently for a month or so, or longer, at a time. On the 2d of April, 1870, when I was in Leavenworth, I had, I suppose, twenty-eight or twenty-nine hundred dollars; somewhere about there. That was in currency I believe.

The following question was then asked the witness: State in what manner you obtained that money.

123 The witness then answered as follows: "I earned it."

The witness was then asked the following question: How did you earn it?

The witness then answered as follows:

Ans. In various ways—partly by farming, partly by trading in stock, partly by the practice of medicine.

The witness was then asked the following question: How much of it did you earn by the practice of medicine?

The witness then answered as follows:

Ans. Probably $1,000 to $1,200, more or less. The same amount perhaps by farming, probably more; probably $600 or $700; couldn't state positively the amount. I practised medicine at Hillsboro, Ohio, something over a year; probably 18 months or two years; it may have been

longer; don't recollect exactly. That was in 1868 & 1869, just previous to my coming out here.

The witness was then asked the following question: For how long before commencing to practice did you study medicine?

The witness then answered as follows:

Ans. It was probably two years or more. I studied and practised together between three and four years. I was farming up to the
124 time I went to studying medicine. Farmed in Highland County, Ohio, on my father's farm. I farmed till the time I went to studying medicine from the time I was old enough. Commenced as soon as I could hoe weeds; couldn't state how old I was. I had charge of that farm under an arrangement that I should go on and make what I could out of the farm. There was 333 acres in the farm; near 250 acres under cultivation, well improved, pretty well stocked. The arrangement to work the farm was with my father, verbal. I had about the entire charge and superintendence of the farm from some time about the time the war ommenced, or after that; I had charge of the farm 4, 5, or 6 years beforec commencing to study medicine; probably longer; probably not so long.

The witness was then asked the following question: Did you not state in your testimony in the bankruptcy-case last fall that you had charge of that farm for 10 years prior to commencing the study of medicine.

The witness then answered as follows:

Ans. I don't recollect that I did, whether I stated anything positive about it. I don't recollect how old I was at the time I made the
125 arrangement with my father—probably 13, 14, 15, or 16, somewhere along there; probably older. I don't recollect testifying in the bankruptcy-case that I was 11 or 12 years of age when I made this arrangement. I was present part of the time during the argument of that case before the judges. This farm I suppose was worth $15,000 to $20,000. My father was living on it part of the time, and part not in the arrangement. I was not to give my father anything in particular. I was to supply the wants of the family from the productions of the farm. I accumulated something over $1,000 during this time. I think it was during this time I traded in stock. Then went to studying medicine. I don't know but what during this time I borrowed some money of Oliver S. Glenn, $200 more or less, I think. I got about that amount of him in the fall of 1867. I am not positive about the date. He was in Cheyenne at the time I borrowed it. I did not apply to him in person, but by letter I believe. I am not positive about that. I believe it was a loan.

The witness was then asked the following question:

Question. How came you to write to him for that money?

The witness then answered as follows:

126 Ans. Simply because I had use for it.

The witness was then asked the following question:

Question. Didn't you testify in the bankruptcy-case in Denver that you wrote to him because you was hard up?

The witness then testified as follows:

Ans. I don't recollect whether I ever applied to O. S. Glenn for money at any other time, or whether I did or did not. May have got various sums, but I don't recollect but the $200.

The witness was then asked the following question:

Question. Don't you recollect of getting $50 of him in 1867 or 1868?

The witness then answers as follows:

Ans. I don't recollect whether I did or did not.

Witness then testified: Oliver S. Glenn came back with me from

Texas as far as the Arkansas River, Wichita City. He then went to Abilene or that neighborhood; he joined us there. We saw him there. From there I supposed he went to Leavenworth. He didn't come to Colorado with us. I arrived in Colorado with these cattle somewhere about the first of September. I arrived at or near Greeley about the tenth of September. After O. S. Glenn left us at Abilene I next met him
127 near Greeley, about the time of our arrival there with the cattle. This meeting was entirely accidental. I didn't expect to meet him there. I was rather surprised when I met him. I know one Mr. Crowley, who lives at or near Abilene. I have seen him, I believe. I first met him about the last of July, 1870, in Abilene. There was a loan negotiated there at that time from Crowley for $1,100. Oliver S. Glenn was, I believe, acquainted with Crowley before meeting him there. Oliver S. Glenn was there at the time this loan was negotiated. I think neither Oliver S. Glenn nor Rufus E. Talpey, negotiated this loan. I don't know that they took any part in it. I never was in Colorado before the time of my arrival at that time. I couldn't tell you where Oliver S. Glenn is now. I don't know. Don't think he is in Colorado. From the time I met him at Greeley, in Sept., 1870, up to the time he left the Territory, I believe he was somewhere on the Cache a la Poudre what time he was not in Denver. He was on Cache a la Poudre after I met him in September, 1870, till about the last of March, I believe. I don't know whether he was engaged in any occupation or not. I probably saw him a
128 half dozen times. May be not so often. Don't know as I saw him oftener than that. Rufus E. Talpey has resided somewhere on Cache a la Poudre since his arrival in the Territory in Sept., 1870; somewhere near Fort Collins, I think. I don't know whether he has been engaged in any business or not. I may have seen him five or six times. Have seen him several times. Don't know as more than five or six times. I believe about all of the herd was attached at the time this attachment was levied. All of the cattle in our possession were attached. There were not all attached with which we arrived near Greeley. Perhaps 25 or 30 head was not attached of these. I sold part to a Mr. Wright; some to Lewis M. Stone. That comprised all of them.

The witness was then asked the following question:

Question. Didn't Rufus E. Talpey get a portion of those cattle which you say were not attached?

Witness then answered as follows:

Answer. Never to my knowledge. He never got any from me.

The witness was then asked the following question:

Question. Didn't he take one or more of that 25 head of which you speak, and turn over to Judge Howe, the gentleman with whom he was boarding?

And thereupon witness answered as follows:

129 Ans. I don't know anything about it—any transaction of that kind.

The following question was then asked witness:

Question. Don't you know that Judge Howe, the man with whom R. E. Talpey had been stopping, did have one or more of that 25 head of which you speak?

And the witness answered as follows:

Ans. Don't know it.

The witness was then asked the following question:

Question. Did you ever authorize your brother, O. S. Glenn, by writing or otherwise, to sell and dispose of those cattle?

And the witness answered as follows:

Ans. I never did.

The following question was then asked witness:

Question. Did you ever appoint your brother, Oliver S. Glenn, your agent or attorney in fact, by writing or otherwise, to transact any and all of your business?

And the witness answered as follows:

Ans. I never did.

Witness then testified as follows: My father's family consisted of 3 sisters and 4 brothers. The three sisters were at home part of the time I had charge of farm, and part of time but two. There was no given length of time that I was to have charge of the farm. No time fixed.

Don't know as I could state annual proceeds of the farm
130 during my superintendency of it, nor anywhere near it. Don't recollect of borrowing $50 of O. S. Glenn at one time, or of writing to him for it. May have written him at various times, and may not.

Upon cross-examination by the interpleading claimants witness testified as follows:

While I was on the farm I think my brothers were in the service—U. S. service. My father is upwards of 60 years old now, I believe.

CHRISTIAN S. EYSTER was then introduced and sworn as a witness for the plaintiffs for the purpose of impeaching the witness Rufus E. Talpey. And thereupon the said Christian S. Eyster was sworn in chief and testified as follows:

In 1870 I resided in Denver. In October I was here. I was then judge of the district court of this district, and member of the supreme court. I acted as one of the judges in a certain proceeding of involuntary bankruptcy brought by Farwell & Co. against Oliver S. Glenn and Rufus E. Talpey, of the firm of Glenn & Talpey. I was on the bench during the trial of that cause. Don't recollect the time. It was some time last fall or summer.

131 (A paper was here handed to witness, who proceeded and stated as follows:)

I can state the time from this paper. It is my notes taken at the time. I see the date 20th October at the heading. Rufus E. Talpey, one of the defendants in that bankruptcy proceeding, testified in it.

The following question was then asked the witness:

Question. State what he testified, if anything, respecting the amount of indebtedness owed by the firm of Glenn & Talpey at the time of their suspension on or about the 9th of June, 1868.

(To which question the interpleading claimants objected, and the objection was sustained by the court; to which ruling of the court the plaintiffs then and there excepted.)

The following question was then asked witness:

Question. Did not Rufus E. Talpey, in the bankruptcy-cause in Denver of which you speak, testify that the indebtedness of Glenn and Talpey at the time of their suspension was about $30,000?

And the witness answered as follows:

Ans. Mr. Talpey, I think, did so state.

The witness was then asked the following question:

Question. Did or did not Rufus E. Talpey, in the bankruptcy-case in Denver of which you speak, testify that he thought the consideration of the sale to Hanna was $15,000?

132 And the witness answered as follows:

Ans. "Mr. Talpey, in testifying in relation to that sale, said

that the consideration of it was in the neighborhood of $15,000. I refreshed my memory this morning. My referring to my notes, and my impression is, that I so took it down, and that it was correct.

The following question was then asked witness:

Question. Did or did not Rufus E. Talpey, in the bankruptcy-case at Denver of which you speak, testify that the sale of the assets of the*re* firm at La Porte was about 30 days prior to the suspension of the firm?

(To which question the interpleading claimants objected, on the ground that it was as to a collateral fact, and the objection was sustained by the court; to which ruling of the court, the plaintiffs then and there excepted.)

The following question was then asked witness:

Question. Did or did not Rufus E. Talpey, in his testimony in the bankruptcy-case of which you speak, testify that he bought some cattle—between 800 and 900 head—in Texas?

And the witness answered as follows:

Ans. I don't think he did; I think not, sir.

The following question was then asked witness:

133 Question. Did or did not Lockhart T. Glenn, in the bankruptcy-case at Denver of which you speak, testify with reference to any loans made by his brother, Oliver S. Glenn, to him; and, if so, what?

And the witness answered as follows:

Ans. Mr. Glenn did testify of some money borrowed by him of his brother on that occasion; I can't recollect what it was.

(Witness here referred to his notes taken on the occasion referred to in question and proceeded:)

"Mr. Glenn testified on that occasion that he had received about $200 from his brother as a loan. He at same time testified that he had received once before, he thought, from his brother $50."

The following question was then asked witness:

Question. Did or did not Lockhart T. Glenn, in the bankruptcy-case at Denver of which you speak, testify anything respecting his age at the time that he made his arrangement with his father, and take charge of his farm; and, if so, what did he state his age to be?

(To which question the interpleading claimants objected on the ground that the question was as to a collateral fact, and the objection was sustained by the court; to which ruling of the court the plaintiffs then and there excepted.)

134 And thereupon the witness on cross-examination by the interpleading claimants testified as follows: I think I took the testimony of L. T. Glenn very correctly; would not say I took it verbatim. I took it with care. Think Rufus E. Talpey, in addition to what he said about the indebtedness of Glenn and Talpey, used the words, "at a rough estimate."

And thereupon witness was re-examined by plaintiffs, and testified as follows:

I used to take my notes as exact and accurate as I could. The words "rough estimate" occur in my own minutes.

And the plaintiffs introduced no further testimony, and rested their case.

And thereupon, in rebuttal, the interpleading claimants introduced as a witness on their behalf RUFUS E. TALPEY, who had been sworn in chief, and the following question asked him:

Question. When and in what amounts did you send money to your mother?

(To which question plaintiffs objected, and the objection was overruled by the court; to which ruling of the court plaintiffs then and there excepted.)

And witness answered as follows:

Ans. I forwarded some money to my mother in last of 1862 or beginning of 1863; to the best of my recollection it was $500. That is
135 the first and last time. I never forwarded her a dollar more or less.

GEORGE E. TALPEY was then introduced and sworn, and testified as follows:

I heard John Q. A. Rollins' testimony this morning.

The following question was then asked witness:

Question. Please to state in detail what the conversation which you had with him and of which he testified was.

(To which question plaintiffs objected on the ground that no proper foundation had been laid for the question wherewith to impeach John Q. A. Rollins, and the objection was overruled by the court; to which ruling of court plaintiffs then and there excepted.)

And the witness answered as follows:

Ans. As near as I can state it, it was this: There was a young man roomed with me by the name of Stanley, and had been for two or three months in Mr. Rollins' house. At the time I left Cheyenne I left very unexpectedly. This room-mate of mine was owing me $15 *fifteen*—about that amount.

(Plaintiffs here moved the court to strike out the testimony of witness and exclude the same from the consideration of the jury; which motion was overruled by the court, to which ruling of the court
136 plaintiffs then and there excepted.)

And witness proceeded and testified as follows: I asked my room-mate for this amount; he didn't have it, and we were owing Rollins $30. I believe he said he would assume the room-rent in full. So we went to see Rollins, and Rollins agreed to accept Stanley for the full amount.

(Plaintiffs here renewed their motion to strike out the testimony of witness and exclude the same from the consideration of the jury; which motion was overruled by the court; to which ruling of the court plaintiffs then and there excepted.)

And witness proceeded and testified as follows: I didn't leave my trunk there. I left in care of a young man by name of Meyers.

The following question was then asked witness:

Question. What did you do with the trunk?

(To which question plaintiff objected, and the objection was overruled by the court; to which ruling of the court plaintiffs then and there excepted.)

And witness answered as follows:

Ans. Meyers and I moved it into his room in the presence of Rollins. He made no objection.

This was all the testimony in the case offered by either party, and the case was closed.

137 And thereupon the plaintiffs asked the court to instruct the jury on behalf of the plaintiffs as follows:

1st. The jury are instructed that the burden of proof in this issue was on the interpleaders, Geo. O. Talpey and Lockhart T. Glenn, to show that they were the owners of the property attached in this suit. And if the jury believe from the evidence in this case that these interpleaders have failed to make out a clear case of ownership they must find for the pl'ff.

2d. The jury are instructed that the mere fact that the witness Benson, when he attached the cattle in controversy, found these two interpleaders in charge of the cattle, in connection with three or four other persons, does not establish or prove that the cattle were in the sole care and possession of the interpleaders. And if the jury believe from all the evidence that these interpleaders have not clearly proven that they were the owners of the cattle, and in the sole possession of the same, they will find for the pl'ff.

3d. The jury are instructed that the mere fact that the witness
138 Rufus E. Talpey saw the cattle delivered to the interpleaders in this case does not prove that they were the owners of the same, but that to establish ownership in themselves they should have proven a sale of the cattle & a delivery of them, and that they thereafter continued in the actual possession of the same. And if the jury are satisfied from the evidence that the interpleaders have not made out a clear case of ownership and possession they should find for the pl'ff.

4th. The jury are instructed that the fact that Rufus E. Talpey and George O. Talpey were parties to this suit goes to their credibility, and it is the duty of the jury to consider this fact as going to the credibility of these two witnesses.

5th. It is a rule of law that whatever may be the issue between the parties upon the pleadings, either party has the right to establish the existence of fraud by proof of facts that show the existence of fraud in the opinion of the jury between the parties. And when in the opinion of the jury upon the evidence the fact of fraud is established the party upon whom the fraud is established cannot claim any legal rights by virtue of any contract or legal status arising out of any con-
139 dition of in which such fraud existed.

6th. The jury are instructed that the law, having regard to the fact that a party committing fraud seeks by every means to conceal it, gives to the jury a broad and liberal power and right to infer from the facts and circumstances attending a transaction if in the opinion of the jury such facts and circumstances as are proved establish or tend to establish the existence of fraud upon the party charged.

And the court refused to so instruct the jury; to which ruling of the court in refusing to give said instructions to the jury plaintiffs then and there excepted.

And thereupon the court gave to the jury the following instructions:

The burden of showing that they are the owners of the property in question, and were such owners at the time of the levy of the attachment, is upon the interpleading claimants. But if at the time of the levy of the writ of attachment in this case the property was found in the possession of the interpleading claimants then from such
140 possession the law raises a presumption that the interpleading claimants were then the owners of such property, and, unless it has been shown to the satisfaction of the jury that such possession of the interpleading claimants (if they were so in possession) was colorable or fraudulent and a possession for the use of the defendants in this suit the interpleading claimants may recover.

If the interpleading claimants purchased the stock which is in con-

troversy with the funds of the defendants, or held the same for the use of the defendants, then such purchase and holding was a fraud upon the creditors of the defendants, and the property in question was subject to the levy of the plaintiffs' writ of attachment.

Such fraud as supposed in the last instruction is not to be presumed or inferred without proofs, and it is for the jury to say upon all of the facts and circumstances in proof whether the possession of the interpleading claimants was an honest one, or merely colorable and fraudulent.

The jury are the sole judge of the credibility of the witnesses,
141 and, in the exercise of this judgment, may receive or reject entirely the evidence of any witness whose credibility is before them in this case.

The form of the verdict in this case will be—

JOHN W. DOANE ET AL.
v.
OLIVER S. GLENN ET AL.

We find the issue joined in this cause between the said plaintiffs and Lockhart T. Glenn and Geo. O. Talpey, interpleading claimants, for the said plaintiffs, (or for the said interpleading claimants.)

To the giving of which said instructions to the jury plaintiffs then and there excepted, and thereupon the jury returned into court the following verdict.

JOHN W. DOANE ET AL.
v.
OLIVER S. GLENN ET AL.

We find the issue joined in this cause between the said plaintiffs and Lockhart T. Glenn and George O. Talpey, interpleading claimants, verdict for the interpleading claimants.

142 SAMUEL N. HOYT,
Foreman.

And thereupon the court, in the presence of the jury, and before they were discharged from the further consideration of the cause, amended the said verdict by striking therefrom the word "verdict;" to which said amendment by the court in striking said word "verdict" from the verdict of the jury so rendered into court as aforesaid, and before said jury was discharged, plaintiffs then and there excepted.

Whereupon the counsel for the said plaintiffs filed the following motion for a new trial:

TERRITORY OF COLORADO,
County of Arapahoe:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid. June term thereof, A. D. 1871.

J. W. DOANE ET AL.
v.
O. S. GLENN ET AL., AND GEORGE O.
143 Talpey and Lockhart T. Glenn, who interplead in said cause, claiming the property attached.

And now on this day comes the said plaintiffs, and move the court for

a new trial on the issue between the said plaintiffs and the above-named interpleading claimants, tried at this term, and that the verdict of the jury found on said issue may be set aside for the following reasons, to wit:

1st. Because the verdict of the jury on said issue is contrary to the law of the case.

2d. Because the verdict of the jury on said issue is against the evidence given in the cause.

3d. Because the court refused proper instructions asked for on behalf of the plaintiffs.

4th. Because the court gave improper instructions in said cause.

5th. Because the court excluded proper testimony offered on the trial of said issue by the plaintiffs.

144 6th. Because the court admitted improper evidence to go to the jury on behalf of the interpleading claimants.

7th. Because the court excluded the deposition of J. W. Hanna on a motion made on the trial of said cause by the interpleading claimants.

8th. Because on the reception of the verdict of the jury the court instructed the clerk to change the verdict of the jury by striking out the word "verdict."

9th. Because the verdict of the jury does not find the issue and the right of property in the interpleading claimants.

10th. Because the court erred in admitting the evidence of the witness Benson to go to the jury, and refused to exclude the same when it clearly appeared on his cross-examination that his statement as to who was in possession of the cattle was heresay, derived from the interpleaders themselves.

11th. Because the court refused to dismiss the interplea, it ap-
145 pearing in evidence that George O. Talpey was a minor under age when this writ of attachment was levied, and when said plea was filed in said cause.

12th. And for other good and sufficient reason, &c.

CHARLES & ELBERT,
For Pltffs.

But the court overruled the said motion and gave judgment upon the said verdict of the said jury against the plaintiffs; to which the plaintiffs then and there excepted. And inasmuch as the matters aforesaid do not appear of record, the counsel for the plaintiffs present this bill of exceptions, and pray that the same may be signed and sealed by the court, and made part of the record in said cause, and it is done accordingly.

(Signed) E. T. WELLS, [L. S.]
Judge.

Bill of exceptions tendered to me Aug. 23d, 1871.

(Signed) E. T. WELLS,
Judge, &c.

(Endorsed as follows, to wit:) John W. Doane et al. vs. Oliver S. Glenn et al., and Lockhart T. Glenn and George O. Talpey, interpleaders. Bill of exceptions. Filed August 23, 1871. Geo. H. Mills, clerk.

146 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, George H. Mills, clerk of the district court of the first judicial district of Colorado Territory, in and for the county of Arapahoe, do hereby certify that the above and foregoing is a true and perfect transcript and copy of all proceedings had and entered of record, of the original process, pleadings of the parties, bill of exceptions, and all other papers which form a part of the record of a certain cause lately pending in said court wherein John W. Doane, Patrick J. Towle and John Roper were plaintiffs, and Oliver S. Glenn and Rufus E. Talpey defendants, and Lockhart T. Glenn and George O. Talpey were interpleading claimants.

In witness whereof I have hereunto subscribed my name and the seal of said court affixed at Denver, this 23d day of August, A. D. 1871.

[SEAL OF DISTRICT COURT.] GEORGE H. MILLS,
Clerk.

TERRITORY OF COLORADO:

In the supreme court of said Territory. To the February term thereof, A. D. 1872.

147 JOHN W. DOANE, PATRICK J. TOWLE, & John Roper, partners, doing business under the firm name of J. W. Doane & Co.,
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, LATE partners under the firm-name of Glenn & Talpey, and Lockhart T. Glenn and George O. Talpey, who interplead in this suit, claiming the property attached in said cause. } Assignment of errors.

And now comes the said John W. Doane, Patrick J. Towle, & John Roper, the said plaintiffs in error, by Charles & Elbert, their attorneys, and say that in the record and procedings aforesaid there is manifest error, in this, to wit:

1st. The court erred in refusing to instruct the jury as asked by the said plaintiffs in error.

2d. The court erred in the instructions which were given to
148 the jury in this cause by the court.

3d. The court erred in refusing the motion of said plaintiffs to strike out that portion of the evidence of the witness Benson as to the fact that the interpleading claimants were in the possession of said cattle at the time of the levy of said writ of attachment.

4th. The court erred in excluding from the jury the deposition of the witness Hanna.

5th. The verdict of the jury was manifestly against the evidence in the case.

6th. The court erred in ordering the clerk to amend the verdict rendered in this cause.

7th. The court erred in overruling the motion for a new trial in this cause.

8th. The court erred in admitting improper evidence on behalf of the interpleading claimants.

9th. The court erred in refusing proper and competent evidence to go to the jury offered on behalf of the plaintiffs on said trial.

10th. The court erred in rendered judgment for said interpleading claimants.

By reason whereof the plaintiffs pray that said judgment may be reversed, &c.

CHARLES & ELBERT,
Attorneys for Pl'ffs in Error.

149 If the plaintiffs in error shall give bond to def'ts in error, Lockhart T. Glenn and George O. Talpey, in the sum of fifteen thousand dollars, with sureties, to be approved by the clerk of the supreme court, and conditioned as in cases of appeal from the district court to the supreme court, let the writ of error to be issued upon filing this transcript of the record in the cause therein entitled operate as a supersedeas.

Pueblo, Aug. 26, 1871.

MOSES HALLETT,
C. J. Sup. Court Col. Ter'y.

To the clerk of the supreme court.

(Endorsed as follows:) Supreme court. ✕ 22. J. W. Doane et al., pl'ffs in error, vs. L. T. Glenn et al., def'ts in error. Transcript of record. Filed August 28th, 1871. David W. Crater, clerk.

150 And which said bond, filed as aforesaid, is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., of the city of Chicago, county of Cook, and State of Illinois, as principals, and John S. Brown and Wolf Londoner, of the county of Arapahoe, and Territory of Colorado, as sureties, are held and firmly bound unto Lockhart T. Glenn & George O. Talpey, of the county of Weld and Territory of Colorado, in the penal sum of fifteen thousand dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, dated on this 28th day of August, A. D. 1871.

The condition of the above obligation is such, that whereas the said Lockhart T. Glenn and George O. Talpey did, on the 29th day
151 of July, A. D. 1871, in the district court of the first judical district of Colorado Territory within and for the county of Arapahoe, at the June term, A. D. 1871, thereof, recover a judgment against the above-bounden John W. Doane, Patrick J. Towle, and John Roper, partners as aforesaid, for the delivery and return of certain property and costs of suit in a certain action by attachment wherein the said John W. Doane, Patrick J. Towle, and John Roper, partners as aforesaid, are plaintiffs, and Oliver S. Glenn and Rufus E. Talpey are defendants; and the said Lockhart T. Glenn and George O. Talpey, under and by virtue of the statutes in such case made and provided, are interpleading claimants of the property attached in said action on the writ of attachment issued therein & recovered in said judgment; and whereas the said John W. Doane, Patrick J. Towle, and John Roper, partners as aforesaid, are about to sue out of the office of the clerk of the supreme court of Colorado Territory a writ of error for the purpose

of taking the record of said judgment to the supreme court
152 of said Territory, and having the same reviewed and reversed; and whereas the honorable Moses Hallett, chief justice of said Territory, after inspecting a copy of the record in said cause, has ordered that said writ of error, when issued, shall be made a supersedeas upon the said John W. Doane, Patrick J. Towle, and John Roper, partners as aforesaid & plaintiffs in said suit, giving bond to the said Lockhart T. Glenn and George O. Talpey, defendants in error, in the sum of fifteen thousand dollars, with sureties to be approved by the clerk of the supreme court, and conditioned as in cases of appeal from the district courts to the supreme court:

Now therefore if the said John W. Doane, Patrick J. Towle, and John Roper, plaintiffs in error, shall duly prosecute their said writ of error, and shall pay said judgment costs, interests, and damages in case the said judgment shall be affirmed, then the above obligation to be
153 void; otherwise to remain in full force and effect.

JOHN W. DOANE, [SEAL.]
By J. Q. CHARLES, *his Att'y in Fact.*
PATRICK J. TOWLE, [SEAL.]
By J. Q. CHARLES, *his Att'y in Fact.*
JOHN ROPER, [SEAL.]
By J. Q. CHARLES, *his Att'y in Fact.*
JOHN S. BROWN. [SEAL.]
WOLF LONDONER. [SEAL.]

(Endorsed as follows:) ✗ 22. J. W. Doane et al. vs. L. T. Glenn et al. Bond.

The within bond approved by me, and filed in my office this twenty-eighth day of August, A. D. 1871.

DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Territory.

Charles & Elbert, for pl'ffs in error.

And which power of attorney to execute bond is in the words and figures following, to wit:

Power of att'y.

Know all men by these presents that we, John W. Doane, John
154 Roper, and P. J. Towle, of the city of Chicago, county of Cook, & State of Illinois, do hereby make, constitute, and appoint John Q. Charles and Sam. H. Elbert, of Denver, in the Territory of Colorado, or either of them, our true and lawful attorney, for us, and in our name, place, and stead, to execute any bond or undertaking required by law, or necessary for the purpose of appealing or sueing out a writ of error and supersedeas in a certain cause now pending in the district court for the county of Arapahoe and Territory aforesaid, in which the said John W. Doane and others are plaintiffs and Oliver S. Glenn and Rufus E. Talpey are defendants, and Lockhart T. Glenn & George O. Talpey are interpleaders, claiming the property attached by said plaintiffs in said cause as the property of Oliver S. Glenn and Rufus E. Talpey, and to execute any other bond necessary to indemnify any other person or
155 persons for becoming sureties on such appeal or supersedeas bond, as fully and to all intents and purposes as we might or could do

if personally present, hereby ratifying all that our said attorneys, or either of them, shall do in the premises.

In witness whereof we have hereunto set our hands and seals this 22nd day of August, A. D. 1871.

J. W. DOANE. [SEAL.]
JOHN ROPER. [SEAL.]
P. J. TOWLE. [SEAL.]

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

On this 22d day of August, A. D. 1871, before me, a notary public in and for said city, came John W. Doane and John Roper, to me personally known as the same persons who executed the foregoing power of attorney, and acknowledged that they executed the same for the uses and purposes therein set forth.

[NOTARIAL SEAL.] JOHN J. McCLELLAN,
Notary Public.

156 Which said power of attor'y is endorsed as follows, to wit ✠ 22. Supreme court. J. W. Doane et al., pl'ffs in error, vs. L. T. Glenn et al., def'ts in error. Power of att'y to execute bond. Filed August 28, 1872. David W. Crater, clerk.

And which said præcipe is in the words and figures following, to wit:

Præcipe.

TERRITORY OF COLORADO:

In the supreme court of said Territory. To the February term, A. D. 1872.

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, under the firm-name of J. W. Doane & Co.,
vs.
LOCKHART T. GLENN & GEORGE O. TALPEY.
} Error to Arapahoe County.

Judgment for the delivery of property in favor of the above defendants as interpleading claimants, & costs of suit.

157 The clerk of the supreme court will please issue a writ of error to the district court of Arapahoe County, to be endorsed as supersedeas against the above defendants in error at the suit of the above plaintiffs in error, returnable to the next term of the supreme court, & oblige—

CHARLES & ELBERT,
Att'ys for Pl'ffs in Error.

To D. W. CRATER, Esq., *Clerk, &c.*

(Endorsed:) J. W. Doane et al. vs. L. T. Glenn et al. Præcipe for writ of error. Filed August 28, 1871. David W. Crater, clerk.

And which said cost bond is in the words and figures following, to wit:

TERRITORY OF COLORADO, *ss:*

In the supreme court of said Territory. To the February term, A. D. 1872.

158 JOHN W. DOANE, PATRICK J. TOWLE, and John Roper, partners, as J. W. Doane & Co., *vs.* LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleading claimants, &c. } Error to Arapahoe County.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, pursuant to the laws of this Territory. Dated on this 28th day of August, A. D. 1871.

JOHN S. BROWN. [SEAL.]
WOLF LONDONER. [SEAL.]

(Endorsed:) J. W. Doane et al. vs. L. T. Glenn et al. Cost bond. Filed August 28, 1871. David W. Crater, clerk. Charles & Elbert, att'ys for pl'ffs in error.

159 Whereupon there was issued out of the supreme court of Colorado Territory a writ of error and supersedeas and a summons; which said writ of error is in the words and figures following, to wit:

160 TERRITORY OF COLORADO,
Supreme Court, ss:

The people of the Territory of Colorado to the clerk of the district court of the first judicial district of Colorado Territory, within and for the county of Arapahoe, greeting:

Because in the record and proceedings, and also in the judgment, in a suit which was lately in the district court of Arapahoe County, before the judge thereof, between John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs, and Oliver S. Glenn and Rufus E. Talpey, partners, doing business under the firm-name of Glenn & Talpey, and Lockhart T. Glenn and George O. Talpey, interpleading claimants of property attached, defendants, of a plea in attachment, manifest error hath intervened, as it is said, to the great injury of the said John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of John W. Doane & Co., as we are informed; and we, being willing that the said error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if final judgment has been rendered, that you send to the justices of our supreme court at Denver, in said Territory, with all convenient dispatch, a true copy of all the pleadings therein, together with a complete and perfect transcript of the record and proceedings of the suit aforesaid, with all things concerning the same, distinctly and openly, under the seal of your court, together with this writ, so that the said justices may have them at the place of holding the said supreme court, in Denver, on the second Tuesday of February,

A. D. 1872, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon for correcting that error what of right according to law and the rules of said court ought to be done.

Witness the Hon. Moses Hallett, chief justice of our said supreme court, at Denver, and the seal thereof, this twenty-eighth day of August, A. D. 1871.

{ SEAL OF SUPREME COURT } { OF COLORADO TERRIT'Y. }

DAVID W. CRATER,
Clerk Supreme Court.

(Endorsed:) A transcript of the record in this cause having been filed in my office, with an order endorsed thereon that the writ of error herein be made a supersedeas according to law, this writ of error is, therefore, made a supersedeas, and shall operate accordingly.

DAVID W. CRATER,
Clerk of Supreme Court.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

It appearing from the above endorsement that a transcript of the record in the withiu-entitled cause having been filed in the office of the clerk of the supreme court, this writ is therefore returned accordingly.

Witness my hand this 28th day of August, A. D. 1871.

GEORGE H. MILLS,
Clerk District Court Arapahoe County.

(Indorsed:) Supreme court. Writ of error. "G" D., No. . Term No. 22. John W. Doane et al., partners, as J. W. Doane & Co., pl'ffs in error, vs. Lockhart T. Glenn et al., defendants in error. Filed in the supreme court this 28 day of August, A. D. 1871. David W. Crater, clerk. Denver Tribune print.

161 And which said summons is in the words and figures following, to wit:

Summons.

TERRITORY OF COLORADO,
Supreme Court, ss:

The people of the Territory of Colorado to the sheriff of Weld County, greeting:

Because in the record and proceedings, and also in the rendition of the judgment, in a suit which was lately in the district court of Arapahoe County, before the judge thereof, between John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs, and Oliver S. Glenn and Rufus E. Talpey, partners, doing business under the firm-name of Glenn & Talpey, and Lockhart T. Glenn and George O. Talpey, interpleading claimants of property attached, defendants, of a plea in attachment, manifest error hath intervened, as it is said, to the great injury of the said John W. Doane, Patrick J. Towle, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., as by this complaint we are informed; a transcript of the record and proceedings of which said judgment we have caused to be brought into our supreme court of the Territory of Colorado, before the justices thereof, to cor-

rect the error in the same, if any there be, in due form and manner, according to law: We therefore command you to summon the said Lockhart T. Glenn and George O. Talpey to be and appear before the justices of our said supreme court, at the next term thereof, to be holden at Denver, in said Territory, on the second Tuesday in February, A. D. 1872, to hear the record and proceedings, and errors assigned, if he shall think fit, and to show cause, if any he can, why the said judgment shall not be reversed for the causes aforesaid; and further, to do and receive what our said court shall order and adjudge in this behalf. And have you then and there this writ, and make return thereon in what manner you execute the same.

Witness the Hon. Moses Hallett, chief justice of our said supreme court, and the seal thereof, at Denver, this twenty-eighth day of August, A. D. 1871.

{ SEAL OF SUPREME COURT OF COLORADO TERRITORY. }

DAVID W. CRATER,
Clerk Supreme Court.

162 (Endorsed as follows:)

I have duly executed this writ by reading the same to Lockhart T. Glenn and George O. Talpey, as I am herein commanded.

J. L. BRUSH,
Sheriff of Weld Co.

EVANS, COL. TER'Y, *Aug't* 30, 1871.

Sheriff's fees: Service, 3.00; mileage, 8.00; return, 75—$11.75.

J. L. BRUSH,
Sheriff Weld Co., Colo.

Supreme court. Scire facias. "G" D., No. . Term No. 22. John W. Doane et al., partners, as J. W. Doane & Co., pl'ffs in error, vs. Lockhart T. Glenn and George O. Talpey, defendants in error. Filed in the supreme court this 19 day of September, A. D. 1871. David W. Crater, clerk.

163 And afterwards, to wit, on the 13th day *day* of February, A. D. 1872, at a stated term of the supreme court of Colorado Territory, begun and held according to law at the city of Denver, in said Territory, on the day last aforesaid—present as aforesaid—among others the following proceedings were had and entered of record:

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs in error,

vs.

LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleading claimants of property attached, defendants in error.

} No. 22. Error to district court, Arapahoe County.

On this day comes the said parties, by their attorneys, Charles & Elbert, for plaintiffs in error, and France & Rogers, for defendants in error; and this cause come' on to be heard on the motion of plaintiffs' attorneys for leave of this court to file an amended record; and
164 thereupon it is ordered by the court that the said plaintiffs in error have leave to file an amended record herein.

And afterward, to wit, on the 14th day of February, A. D. 1872, there was filed in the clerk's office of the supreme court of Colorado Territory an amended record in this cause; which said amended record is in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the first judicial district of Colorado Territory, in and for the county of Arapahoe, before the honorable Ebenezer T. Wells, associate justice of the supreme court of said Territory, assigned to said judicial district, at a term thereof begun and held at the court-house in Denver, in said county of Arapahoe, on the first Tuesday (it being the 3rd day) of October, A. D. eighteen hundred and seventy-one. Present, honorable Ebenezer T. Wells, judge of said court; Merick A. Rogers, esq'r, district attorney of said
165 judicial district; David J. Cook, esq'r, sheriff of said county, and George H. Mills, clerk of said court.

IN THE MATTER OF JOHN W. DOANE, PATRICK J. TOWLE, and JOHN ROPER
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, wherein Lockhart T. Glenn and George O. Talpey were interpleaders. } Attachment.

Be it remembered that heretofore, to wit, on the sixth day of October, A. D. eighteen hundred and seventy-one, and after the record of proceedings theretofore had in this cause had been transmitted to the supreme court of this Territory, in pursuance of the writ of error served upon the clerk of this court, the said sixth day of October, A. D. 1871, being one of the days of the regular October term of said district court in said year, the following proceedings, among others, were had and entered of record in said cause, to wit:

JOHN W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL. } Attachment.

166 Now on this day, on motion of Messrs. Charles and Elbert, attorneys for the said plaintiffs, it is ordered by the court that this cause be continued to the next term of this court.

And afterwards, to wit, on the thirteenth (13) day of October, A. D. eighteen hundred and seventy-one, came the said plaintiffs, by Messrs. Charles & Elbert, their attorneys, and filed in the office of the clerk of said court their notice of a motion to correct the record of certain proceedings heretofore had in this cause, with certain affidavits thereto attached; which said notice and affidavits are in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado Territory, within and for the county aforesaid, of the October term, A. D. 1871.

J. W. DOANE ET AL.
vs.
167 OLIVER S. GLENN AND RUFUS E. TALPEY, defendants, and Lockhart T. Glenn and George O. Talpey, interpleaders. } Attachment.

Lockhart T. Glenn and George O. Talpey, interpleaders in the above cause, and France and Rogers, their attorneys, will take notice that the plaintiffs herein, by Charles and Elbert, their attorneys, will, on the 25th day of October, 1871, or as soon thereafter as counsel can be heard, move the court to amend the record in the above cause, so that it shall show that sixty days' time were given by the court to the plaintiffs in which to prepare and tender a bill of exceptions in this cause, and have the same signed and sealed by the judge of said court in vacation in accordance with the facts, as more fully appears from the affidavits on file in said court, copies of which are hereto annexed; at which time you can appear and resist said motion if you see fit.

168 CHARLES & ELBERT,
Att'ys for Plaintiffs.

To LOCKHART T. GLENN, &
GEORGE O. TALPEY, *Interpleaders*, &
FRANCE & ROGERS, *their Attorneys.*

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado, within and for the county aforesaid, of the October term, A. D. 1871.

J. W. DOANE ET AL.
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, defendants, and Lockhart T. Glenn and George O. Talpey, interpleaders. } Attachment.

John Q. Charles, of lawful age, being first duly sworn, on oath deposeth and says that, at the June term of the above court, A. D. 1871, he, as attorney for the plaintiffs in the above cause, applied to the court for time in which to prepare and tender and have signed and
169 sealed a bill of exceptions taken on the trial of the interplea in the above cause, and that thereupon the said court ordered that this affiant, as attorney aforesaid, have sixty days in which to prepare and tender to the judge of said court said bill of exceptions, and that the same be signed and sealed in vacation; that said application and order was made on the evening of July 29th, A. D. 1871, at or near the close of said June term, and that the record of said court, as it now stands, was never read or approved in the presence or hearing of this affiant or the firm of Charles & Elbert, but was written up and signed by the judge of said court after the adjournment of said court, and that the order aforesaid in relation to the tend'ing of said bill of exceptions, and signing and sealing the same, was omitted by the clerk in writing up the proceedings of said court thereafter; and further saith not.

JOHN Q. CHARLES.

Subscribed and sworn to before me this 13th day of October, A. D. 1871.

170 GEORGE H. MILLS,
Clerk District Court Arapahoe County.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado Territory within and for the county aforesaid, of the October term, A. D. 1871.

J. W. DOANE ET AL.
vs.
OLIVER S. GLENN AND RUFUS E. TALPEY, defendants, and Lockhart T. Glenn and George O. Talpey, interpleaders. } Attachment.

L. C. Charles, of lawful age, being first duly sworn, on oath deposes and says that, at the June term of the above court, A. D. 1871, he was present at the time when the said court overruled the plaintiffs' motion for a new trial of the interplea in said cause, and that thereupon J. Q. Charles, of counsel for plaintiffs, applied to said court for time in
171 which to prepare and tender a bill of exceptions; and that thereupon the said court ordered a stay of proceedings for thirty days, and the said plaintiffs were given time in which to prepare and present their said bill of exceptions, and that the same be signed in vacation, but that affiant does not now recollect the exact number of days given by the court for that purpose.

L. C. CHARLES.

Subscribed & sworn to before me this 13th day of October, A. D. 1871.

GEORGE H. MILLS,
Clerk of District Court Arapahoe County.

(Endorsed:) J. W. Doane et al. vs. O. S. Glenn et al. Notice of motion to amend record and affi'ts attached. Filed Oct. 13, 1871. G. H. Mills, clerk.

And afterwards, to wit, on the fourteenth day of October, A. D. 1871, the said plaintiffs filed in the office of the clerk of this court their motion to amend the record of proceedings theretofore had in this cause; which said motion is in words and figures as follows, to wit:

172 TERRITORY OF COLORADO,
County of Arapahoe:

In the district court of the first judicial district of Colorado Territory within and for the county aforesaid, of the October term thereof, A. D. 1871.

J. W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL., AND LOCKHART T. Glenn and George O. Talpey, who interplead in this suit, claiming the property attached in said cause. } Attachment.

And now on this day came the said plaintiffs, by Charles & Elbert,

their attorneys, and move the court to amend the record of judgment entered in said suit at the last term of this court in favor of the above-named interpleading claimants, so that said judgment shall show that sixty days' time was granted said plaintiffs in which to prepare and tender a bill of exceptions in said cause, and have the same signed
173 and sealed by the judge of said court in vacation.

CHARLES & ELBERT,
Att'ys for Pl'ffs.

(Endorsed:) J. W. Doane et al. vs. O. S. Glenn et al. Motion to amend record. Filed Oct. 14, 1871.

G. H. MILLS, *Clerk.*

And afterwards, to wit, on the thirty-first day of October, A. D. eighteen hundred and seventy-one, came the said plaintiffs and filed, in the office of the clerk of said court a certain affidavit showing service of the notice of their said motion upon M. A. Rogers, one of the attorneys of record of said interpleading claimants; which said affidavit is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado Territory within and for the county aforesaid, of the October term thereof, A. D. 1871.

174 J. W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL., AND LOCKHART T. Glenn and George O. Talpey, who interplead in this suit, claiming the property attached in said cause. } Attachment.

L. C. Charles, of lawful age, being first duly sworn, on oath deposes and says that, on the 14th day of October, A. D. 1871, he personally served full, true, and correct copies of the motion to amend the record in the above-entitled cause, also notice to counsel of said interpleading claimants, together with affiant's and J. Q. Charles' affidavits attached thereto, of the pendency of said motion, on M. A. Rogers, one of the attorneys of record for said interpleading claimants, Lockhart T. Glenn and George O. Talpey; which said motion, notice, and affidavits are now on file in said cause.

L. C. CHARLES.

Subscribed and sworn to before me this 31st day of October, A. D. 1871.

GEORGE H. MILLS,
175 *Clerk of District Court, Arapahoe County.*
By FRANK CHURCH, *Deputy.*

(Endorsed:) J. W. Doane et al. vs. O. S. Glenn et al. Aff't of service of motion & notice to amend. Filed October 31, 1871. George H. Mills, clerk, by Frank Church, deputy.

And afterwards, to wit, on the same day, to wit, on the 31st day of October, A. D. 1871, the same being one of the days of the regular

October term of said court in said year, the following further proceedings were had and entered of record in said court in said cause, to wit:

JOHN W. DOANE ET AL.
vs.
OLIVER S. GLENN ET AL. } Attachment.

Now on this day came the said plaintiffs, by Messrs. Charles & Elbert, their attorneys, and moved the court to amend the record of proceedings in this cause made on the 29th day of July, A. D. 1871,
176 and it appearing to the court that notice of said motion has been served upon Merick A. Rogers, who appears by the affidavit of L. C. Charles, esq'r, filed herein, to be one of the attorneys for the interpleaders herein, and the court being fully advised in the premises, it is ordered by the court that the record of proceedings had and entered of record in this cause upon the 29th day of July, A. D. 1871, and which appears on page 455, journal six, of the records of this court, be, and the same is hereby, amended by adding thereto in words and figures as follows, to wit: "And day until sixty days from this date is given the said plaintiffs in which to tender their bill of exceptions to the rulings and judgment of the court in this cause, and it is ordered by the court that the same may be signed in vacation."

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, George H. Mills, clerk of the district court of the first
177 judicial district of Colorado Te'ritory, in and for the county of Arapahoe, do hereby certify the above and foregoing to be a true and correct transcript and copy of all proceedings had and entered of record in said court of the October term thereof, A. D. 1871, and of the notice, affidavits, and motion to amend the record of proceedings theretofore had in said court, in a certain cause lately therein pending, wherein John W. Doane et al. were plaintiffs, and Oliver S. Glenn et al. were defendants, in which said cause Lockhart T. Glenn and George O. Talpey were interpleading claimants. And I further certify that no other or further proceedings concerning the said interpleaders have been had in said cause since the record of proceedings herein was transmitted to the supreme court of this Territory in August, A. D. 1871, in pursuance of the writ of error from said supreme court.

In testimony whereof I have hereunto subscribed my name
178 and the seal of said court affixed this 13th day of February, A. D. 1872.

[SEAL OF COURT.] GEORGE H. MILLS, *Clerk.*

Cost of this transcript: 19 folios, 3.80; certificate & seal, 1.00—4.80. P'd by pl'ffs.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado Territory within & for the county aforesaid, January term, A. D. 1872.

J. W. DOANE ET AL.
vs.
LOCK. T. GLENN ET AL., INTERPLEADING claimants in the suit wherein O. S. Glenn et al. are defendants. } Attachment.

The clerk of said court will please prepare for us a certified transcript

of the record in this suit since the issuing of the writ of error in the same, including the notice, affidavits, and motion to amend the
179 record in said cause, as well as the record and proceedings of the court thereon.

CHARLES & ELBERT,
Att'ys for Pl'ffs.

(Endorsed:) J. W. Doane et al. vs. L. T. Glenn et al. Præcipe for amended record. Filed February 12, 1872. Geo. H. Mills, clerk.

And which said amended record and præcipe is endorsed as follows, to wit: Doane et al., pl'ffs in error, vs. Glenn et al., def'ts in error. Amended record. Filed February 14, 1872. David W. Crater, clerk.

And to wit, on the 13th day of February, A. D. 1872, came the said interpleaders and defendants in error, by France & Rogers, their attorneys, and file in the office of the clerk of the supreme court of Colorado Territory their motion to dismiss the writ of error in this cause, and which said motion is in the words and figures following, to wit:

TERRITORY OF COLORADO, *ss:*

In the supreme court of Colorado Territory. To the February term, A. D. 1872.

180 JOHN W. DOANE, PATRICK J. TOWLE, and John Roper, plaintiffs in error,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleaders and defendants in error.

And now on this day come the said Lockhart T. Glenn and George O. Talpey, interpleaders and defendants in error in the case of John W. Doane, Patrick J. Towle, and John Roper, copartners, against Oliver S. Glenn and Rufus E. Talpey, by France & Rogers, their attorneys, and move the court to dismiss the writ of error, because the district court to which said writ was allowed erred in granting a stay of proceedings to plaintiffs in error after judgement rendered in favor of the said interpleaders; because said district court erred in refusing to allow the immediate return of the property found to be in the said interpleaders; because the said writ of error was not
181 allowed to the district court upon a final judgement rendered in the cause in which said interplea was interposed; because of irregularities in the prosecution of and the suing out said writ of error, apparent on the face of the record; and because of irregularities and insufficiencies apparent also on the face of the record manifestly erroneous.

FRANCE & ROGERS,
Att'ys for Interpleaders and Defendants in Error.

(Endorsed:) John W. Doane, Patrick J. Towle, & John Roper, plaintiffs in error, vs. Lockhart T. Glenn and George O. Talpey, interpleaders, defendants in error. Motion to dismiss writ of error. Filed February 13, 1872. D. W. Crater, clerk. France & Rogers, att'ys for def'ts.

And afterwards, to wit, on the 16th day of February, A. D. 1872, the same being one of the days of the February term of said supreme
182 court in said year, the following proceedings were had and entered of record in said supreme court in said cause, to wit:

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs in error,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleading claimants of property attached, defendants in error.
} Error to district court, Arapahoe County.

Now, on this day, this cause came on to be heard, on the motion of the said defendants in error, filed herein, to dismiss the writ of error herein; and after hearing the arguments of counsel for the said parties—France & Rogers for the said defendants, and Charles & Elbert for the said plaintiffs—the matter was held under advisement by the court.

And afterwards, to wit, on the 19th day of February, A. D. 1872,
183 the same being one of the days of the February term of said supreme court in said year, the following proceedings were had and entered of record in said supreme court in said cause, to wit:

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs in error,
vs.
LOCKHART T. GLEN AND GEORGE O. TALPEY, interpleading claimants of property attached.
} Error to district court, Arapahoe County.

On this day comes the said parties, by their attorneys, and this cause come on to be heard, upon the motion of said defendants to dismiss the writ of error herein; and the same having been heretofore argued by counsel for said parties, and submitted to the consideration and judgment of the court at the presen tterm thereof, it is ordered by the court that the said motion be overruled and that the opinion of the court filed herein be recorded.

184 Whereupon, on motion of the plaintiffs in error, by Charles & Elbert, their attorneys, leave is granted by the court that the said plaintiffs may file an additional assignment of errors herein.

And afterwards, and on the same day, to wit, the 19th of February, A. D. 1872, come the said plaintiffs in error, by Charles & Elbert, their attorneys, and file in the office of the clerk of this court an additional cause of error, in the words and figures following, to wit:

In the supreme court of Colorado Territory, February term thereof, A. D. 1872.

J. W. DOANE ET AL., PL'FFS IN ERROR,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, def'ts in error, interpleading claimants in this suit, wherein Oliver S. Glenn et al. are defendants.

185 And now comes the said plaintiffs in error, by Charles & Elbert, their attorneys, and by leave of the court for that purpose first had and obtained, say that, in the record and proceedings afore-

said, there is manifest error, in addition to the causes of error heretofore assigned in this, to wit:

That the court erred in the rendition of the judgement aforesaid in this, that said judgment is informal, illegal, and contrary to the law and the evidence.

CHARLES & ELBERT,
Att'ys for Pl'ffs in Error.

(Endorsed:) J. W. Doane et al. vs. L. T. Glenn et al. Additional cause of error. Filed February 19th, 1872, by leave of court. David W. Crater, clerk. Charles & Elbert, for pl'ffs.

And afterwards, on the same day, to wit, the 19th day of Feb-
186 ruary, A. D. 1872, come the said defendants in error, by France & Rogers, their attorneys, and file in the office of the clerk of the court a motion to strike from the files of this court the bill of exceptions filed by the said plaintiffs in error in this cause; which said motion is in the words and figures following, to wit:

TERRITORY OF COLORADO, *ss:*

In the supreme court within and for the Territory of Colorado, to the February term, A. D. 1872.

LOCKHART T. GLENN & GEORGE O. TALPEY, interpleaders and defendants in error,
vs.
JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, plaintiffs in error.

And now, on this day, comes the interpleaders in the case of John W. Doane, Patrick J. Towle, and John Roper against Rufus E. Talpey and Oliver S. Glenn, being defendants in error in the above-entitled cause, by France & Rogers, their attorneys, and move the court to strike
187 from the files the bill of exceptions filed in said cause by the said plaintiffs in error, because said exceptions were not taken and signed and sealed according to the requirements of the statute in such case made and provided, and as appears of the record.

FRANCE & ROGERS,
Att'ys for Defendants in Error.

(Endorsed:) John W. Doane, Patrick J. Towle, and John Roper, plaintiffs in error, vs. Lockhart T. Glenn & George O. Talpey, def'ts in error. Motion to strike out bill of exceptions. Filed February 19, 1872. David W. Crater, clerk. France & Rogers for defendants in error.

And afterwards, to wit, on the 20th day of February, A. D. 1872, the same being one of the days of the February term of said supreme court in said year, the following proceedings were had and entered of record in said supreme court in said cause, to wit:

188 JOHN W. DOANE, PATRICK J. TOWLE, and John Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs in error,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleading claimants of property attached, defendants in error.
} Error to district court, Arapahoe County.

On this day comes the said parties, by their attorneys, and the said defendants in error move the court to strike from the files the bill of exceptions filed herein by said plaintiffs in error, and the same is submitted to the consideration of the court, and judgement thereon is reserved until another day.

And afterwards, to wit, on the 23rd day of February, A. D. 1872, the same being one of the days of the February term of said supreme court in said year, the following proceedings were had and entered of record in said supreme court in said cause, to wit:

189 JOHN W. DOANE, PATRICK J. TOWLE, AND JOHN Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs in error,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleading claimants of property attached, defendants in error.

On this day this cause come on to be heard, and the same having been heretofore and at the present term of this court submitted to the consideration and judgement of the court upon the motion of said defendants in error, filed herein, to strike from the files of this court the bill of exceptions filed in said cause, and the court being fully advised, it is ordered by the court that the said motion to strike the bill of exceptions from the files is overruled, and that the opinion of the court filed herein be recorded; and it further ordered that the said defendants in error file their written joinder in error herein on this day.

190 And afterwards, on the same day, to wit, the 23rd day of February, A. D. 1872, come the said defendants in error, by France & Rogers, their attorneys, and file in the office of the clerk of this court a joinder in error in this cause in the words and figures following, to wit:

TERRITORY OF COLORADO, *ss*:

In the supreme court of the Territory of Colorado aforesaid, to the February term, A. D. 1872.

LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleading claimants, defendants in error,
ats.
JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, plaintiffs in error.
} Joinder in error.

And the said Lockhart T. Glenn and George O. Talpey, defendants in

error, now come and say that there is no error, either in the records and proceedings aforesaid, or in giving judgement aforesaid, in
191 manner and form as above assigned; and therefore they pray that the said judgement may be affirmed, and that their costs may be adjudged to them, &c.

By FRANCE & ROGERS,
Att'ys for Def'ts in Error.

And afterwards, to wit, on the 29th day of February, A. D. 1872, the same being one of the days of the February term of said supreme court in said year, the following proceedings were had and entered of record in said supreme court in said cause, to wit:

JOHN W. DOANE, PATRICK J. TOWLE, AND JOHN Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs in error,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleading claimants of property attached, defendants in error.
} Error to district court, Arapahoe County.

On this day come the said parties, by their attorneys, and this
192 cause come on to be heard, and the same is argued by counsel for said parties, and submitted to the consideration and judgement of the court, and judgement thereon is reserved until another day.

And afterwards, to wit, on the 18th day of March, A. D. 1872, the same being one of the days of the February term of said supreme court in said year, the following proceedings were had and entered of record in said cause, to wit:

JOHN W. DOANE, PATRICK J. TOWLE, AND JOHN Roper, partners, doing business under the firm-name of J. W. Doane & Co., plaintiffs in error,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, interpleading claimants of property attached, defendants in error.
} Error to district court, of Arapahoe County.

193 At this day come the said parties, by their attorneys, and this cause come on to be heard, and the same having been heretofore argued by counsel for said parties, and submitted to the consideration and judgement of the court, and it appearing to the court that there is no error, either in the record and proceedings or in the judgement of the district court of Arapahoe County in this cause, it is therefore ordered by the court that the judgement of the said district court of Arapahoe County be affirmed and stand in full force and effect, that the opinion of the court filed herein be recorded, and that the said defendants in error recover of and from the said plaintiffs in error their costs and charges in this behalf expended, and that they have execution therefor.

And afterwards, in pursuance of said judgment of the supreme court of Colorado Territory, there was taxed and entered of record in the tax-book of said supreme court, by the clerk of said court, against the said plaintiffs in error, the sum of one hundred and fifty-seven dollars and seventy-five cents, costs of suit.

194 And afterwards, and to wit, on the 26th day of March, A. D. 1872, came the said plaintiffs in error, by Charles & Elbert, their attorneys, and filed in the office of the clerk of the supreme court of Colorado Territory, a certain affidavit, power of attorney to execute bond, and bond; which said affidavit is in the words and figures following, to wit:

Affidavit.

TERRITORY OF COLORADO, *ss:*

In the supreme court of Colorado.

JOHN W. DOANE ET AL., PARTNERS &C., PLAINTIFFS in error,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, defendants in error, who interplead in this suit, claiming the property attached, wherein Oliver S. Glenn and Rufus E. Talpey, partners, &c., defendants. } Affidavit.

J. Q. Charles, being first duly sworn, on oath deposes and says that he is one of the attorneys for plaintiffs in the above-entitled
195 cause; that he is conversant with the property therein attached and claimed by the said interpleading claimants, and knows the value thereof, and that the said property is of the value of ten thousand dollars. Further this deponent saith not.

J. Q. CHARLES.

Subscribed and sworn to before me this 26th day of March, A. D. 1872.

MOSES HALLETT,
C. J. Sup. Court Col. Ter.

(Endorsed:) J. W. Doane et al. vs. L. T. Glenn et al. Affidavit of jurisdiction. Filed March 26, 1872. David W. Crater, clerk. Charles & Elbert, att'ys for pl'ffs in error.

And which said power of attorney is in the words and figures following, to wit:

Know all men by these presents that John W. Doane, Patrick J. Towle, and John Roper have made, constituted, & appointed, and by these presents do make, constitute, and appoint John Q. Charles
196 as our true and lawful attorney, for us and in our name, place, and stead, to take the case of J. W. Doane et al. against Lockhart T. Glenn & George O. Talpey, interpleading claimants, by appeal or writ of error to the Supreme Court of the United States, and to execute all bonds and other instruments in writing, under seal or otherwise, necessary or appropriate for said purpose, said case having been lately decided in the supreme court of Colorado. And we hereby give & grant unto our said attorney full power & authority to do and perform all and every act and thing whatsoever requisite or necessary to be done in or about the premises as fully, to all intents and purposes, *as fully* as we might or could do if personally present.

In witness whereof we have hereunto set our hands & seals this 22d day of March, A. D. 1872.

JOHN W. DOANE. [SEAL.]
PATRICK J. TOWLE. [SEAL.]
JOHN ROPER. [SEAL.]

Sealed and delivered in presence of—
J. LINTEN WATERS.

[U. S. internal-revenue stamp, 50 c., duly cancelled.]

197 STATE OF ILLINOIS,
County of Cook, ss:

On the twenty-second day of March, eighteen hundred and seventy-two, before me, a notary public of the county of Cook, in the State of Illinois, appeared John W. Doane, Patrick J. Towle, and John Roper, personally known to me to be the real persons whose names are subscribed to the foregoing power of attorney, as having executed the same, and then acknowledged the execution thereof as their free act and deed.

Given under my hand & seal this twenty-second day of March, A. D. 1872.

[NOTARY SEAL.] J. LINTON WATERS,
Notary Public.

(Endorsed:) Power of att'y to execute bond. Filed March 26, 1872. David W. Crater, clerk.

And which said bond is in the words and figures following, to wit:

Bond.

198 Supreme Court of the United States.

JOHN W. DOANE, PATRICK J. TOWLE, AND John Roper, partners, under the firm-name of J. W. Doane & Co., plaintiffs in error,
vs.
LOCKHART T. GLENN AND GEORGE O. TALPEY, defendants in error, who interplead in this suit, claiming the property attached, wherein Oliver S. Glenn and Rufus E. Talpey, partners under the firm-name of Glenn & Talpey, are defendants.

Know all men by these presents that we, John W. Doane, Patrick J. Towle, and John Roper, and J. Sidney Brown and Wolf Londoner, are held and firmly bound unto Lockhart T. Glenn and George O. Talpey in the sum of twenty thousand dollars, to be paid to the said Lockhart T. Glenn and George O. Talpey, their executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, exec-
199 utors, and administrators firmly by these presents, sealed with our seals, and dated this 26th day of March, A. D. 1872.

Whereas the above-named John W. Doane, Patrick J. Towle, and John Roper, partners, under the firm-name of John W. Doane & Co., hath

prosecuted a writ of error to the Supreme Court of the United States to reverse the judgement rendered in the above-entitled suit by the supreme court of the Territory of Colorado:

Now therefore the condition of this obligation is such, that if the above-named John W. Doane, Patrick J. Towle, and John Roper, partners as aforesaid, shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN W. DOANE, [SEAL.]
By JOHN Q. CHARLES,
His Attorney in Fact.

200 PATRICK J. TOWLE, [SEAL.]
By JOHN Q. CHARLES,
His Attorney in Fact.

JOHN ROPER. [SEAL.]
By JOHN Q. CHARLES,
His Attorney in Fact.

J. SIDNEY BROWN. [SEAL.]
WOLF LONDONER. [SEAL.]

Sealed and delivered in presence of—
J. Q. CHARLES.
J. F. BROWN.
W'M R. BEATTY.

Taken & approved by me this 26 day of March, A. D. 1872.
MOSES HALLETT,
C. J. Sup. Court C. T.

(Endorsed:) J. W. Doane et al. vs. L. T. Glenn et al. Bond. Filed March 26, 1872. David W. Crater, clerk.

And upon the same day, to wit, the 26th day of March, A. D. 1872, there was issued out of the Supreme Court of the United States a writ of error to the supreme court of Colorado Territory; which said writ of error is next hereunto attached, and is as follows, to wit:

Original writ of error.

201 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the Territory of Colorado, greeting:

Because in the records and proceedings, and also in the rendition of the judgment, of a plea which is in the said supreme court before you between John W. Doane, Patrick J. Towle, and John Roper, partners under the firm-name of J. W. Doane & Co., plaintiffs in error, and Lockhart T. Glenn and George O. Talpey, defendants in error, a manifest error hath happened to the great damage of the said John W. Doane, Patrick J. Towle, and John Roper, partners as aforesaid, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you

may leave the same at Washington on the first Monday of December next in the said Supreme Court to be then and there held, that
202 the record and proceedings aforesaid being inspected the said Supreme Court may cause farther to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this 26th day of March, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court Colorado Terri'y.

Allowed by—

MOSES HALLETT,
C. J. Sup. Court Col. Ter.

(Indorsed:) J. W. Doane et al. vs. L. T. Glenn et al. Writ of error. Filed March 26, 1872. David W. Crater, clerk.

203 And on the same day, to wit, on the 26th day of March, A. D. 1872, come the said plaintiffs in error, by Charles & Elbert, their attorneys, and file in the office of the clerk of the supreme court of Colorado Territory a copy of the original writ of error heretofore attached, together with a citation, with its service endorsed thereon, and which said copy of the said original writ of error is in words and figures the same as the original writ, and is endorsed as follows to wit: J. W. Doane et al. vs. L. T. Glenn et al. Writ of error. Copy. Filed March 26, 1872. David W. Crater, clerk.

And which said citation, with its service endorsed thereon, is next hereunto attached, and is as follows:

Original citation and service.

204 UNITED STATES OF AMERICA, *ss:*

To Lockhart T. Glenn and George O. Talpey, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein John W. Doane, Patrick J. Towle, and John Roper, partners, under the firm-name of J. W. Doane & Co., are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, chief justice of the said supreme court of the Territory of Colorado, this 26th day of March, in the year of our Lord one thousand eight hundred and seventy-two.

MOSES HALLETT,
C. J. Sup. Court Col. Ter.

205 UNITED STATES OF AMERICA,
Territory of Colorado, ss:

Leven C. Charles, being first duly sworn, on oath deposes and says, that he personally served the within citation on the within-named Lockhart T. Glenn and George O. Talpey, admonishing them to appear at

a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein John W. Doane et al., partners, &c., are plaintiffs, and the said Lockhart T. Glenn and George O. Talpey are defendants in error, by delivering to Messrs. France & Rogers, to wit, L. B. France and M. A. Rogers, attorneys of record of the said defendants in error, at their office in the city of Denver, county of Arapahoe, and Territory of Colorado, a full, true, and correct copy of the said within citation, on this 26th day of March, A. D. 1872.

LEVEN C. CHARLES.

Subscribed and sworn to before me this 26th day of March, A. D. 1872.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Territory.

(Indorsed:) J. W. Doane et al. vs. L. T. Glenn et al. Citation. Filed March 26, 1872. David W. Crater, clerk. Charles & Elbert, att'ys for p'ffs in error.

206 And afterwards and, to wit, on the 9th day of October, A. D. 1872, come the said plaintiffs in error, by Charles & Elbert, their attorneys, and file in the office of the clerk of the supreme court of Colorado Territory their præcipe for a transcript of the record of said supreme court in this cause; which said præcipe is in the words and figures following, to wit:

1. Precipe, affidavit, and amended bond, & cost bond.
2. Writ.
3. Sheriff's return.
4. Declaration.
5. Plea of interplea.
6. Replication to plea.
7. Order of court as to trial & proceedings thereunder, including order overruling motion for new trial, &c.
8. Bill of exceptions containing all the evidence and exceptions taken by appellants or pl'ffs in error, but leaving out all the objections and exceptions taken by the interpleaders.

D. W. CRATER, Esq.:

207 Please make up record in case of J. W. Doane et al. vs. L. T. Glenn et al., interpleaders in case of J. W. Doane et al. vs. O. S. Glenn et al., for Supreme Court United States, following the items above named and oblige—

CHARLES & ELBERT,
Att'ys for J. W. Doane et al.

(Endorsed:) Supreme court United States Ter. Colorado. Præcipe for record. Doane et al. vs. Glenn et al. Filed Oct. 9, 1872. David W. Crater, clerk.

TERRITORY OF COLORADO,
Arapahoe County, ss:

SUPREME COURT CLERK'S OFFICE,
Denver, November 20, 1872.

I, David W. Crater, clerk of the supreme court of Colorado Territory, do hereby certify that I have compared the writings annexed to this

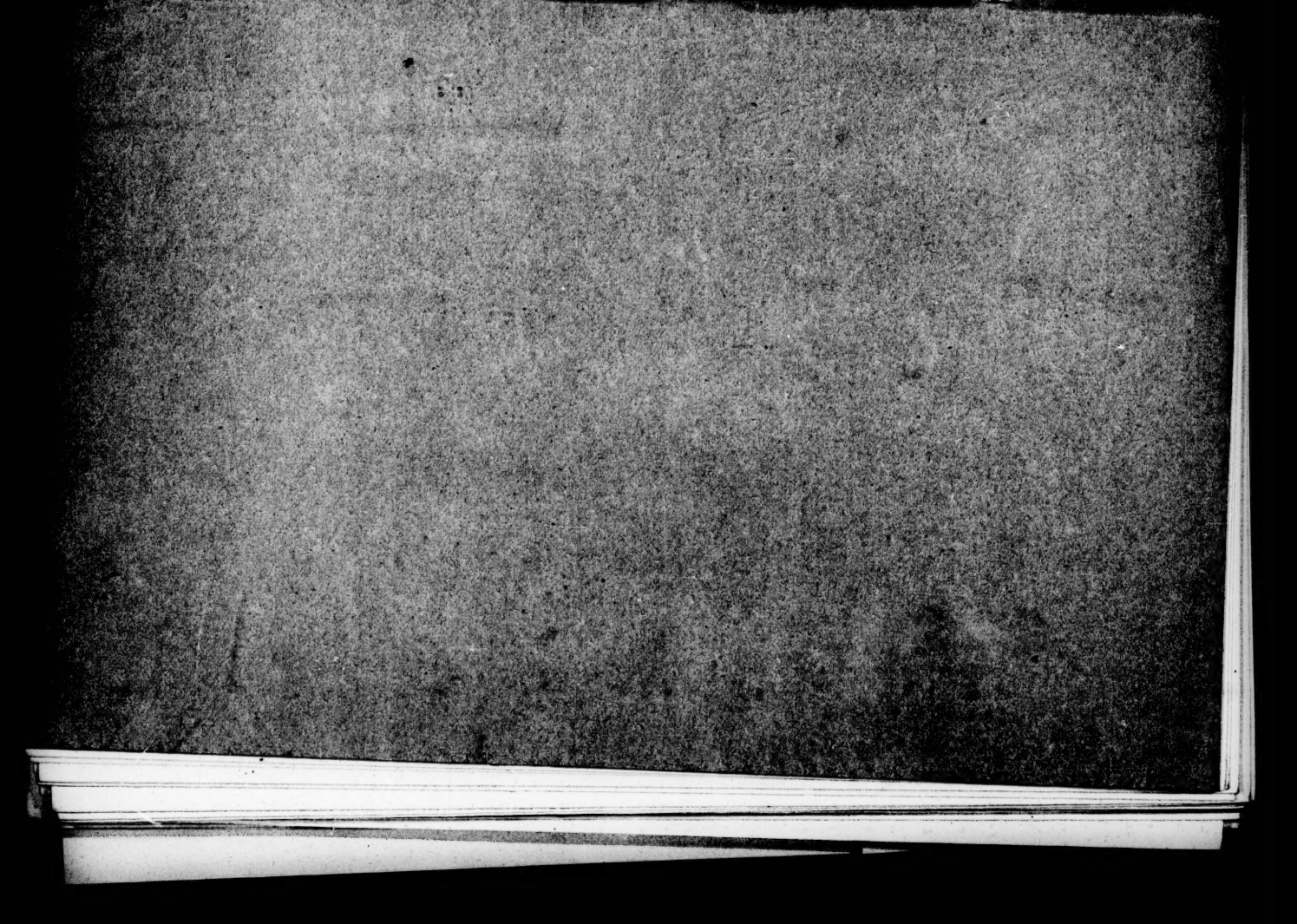
certificate, and that they are true copies of their respective originals and correct transcripts therefrom now on file and remaining of record in my office, and that the same is a full, true, and complete transcript of the record and proceedings, (leaving out so much thereof as directed by the above and foregoing copy of a præcipe for a transcript of
208 the record, said præcipe remaining on file in my office,) in a case lately pending in said supreme court wherein John W. Doane, Patrick J. Towle, and John Roper, partners doing business under the firm-name of J. W. Doane & Co., were plaintiffs in error, and Lockhart T. Glenn and George O. Talpey, interpleading claimants of property attached, were defendants in error. And I do further certify that the writ of error and citation, with its service endorsed thereon, hereto attached, is the original writ of error, citation, and service heretofore, (and on the 26th day of March, 1872,) filed in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said supreme court, at Denver, in said Territory, this 20th day of November, A. D. 1872.

DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Territory.

Costs of transcript, 413 folios, 20c	82 60
Certificate & seal	1 00
Paid by plaintiffs in error.	$83 60

(Indorsement on cover:) No. 328. John W. Doane, Patrick J. Towle, and John Roper, partners as J. W. Doane & Co., plaintiff in error, vs. Lockhart T. Glenn and George O. Talpey. Colorado Terr'y sup. court. Filed 5th December, 1872.



Supreme Court of the United States.

No. 55.

JOHN W. DOANE, ET AL., PLAINTIFFS IN ERROR,

vs.

LOCKHART T. GLENN AND GEO. O. TALPEY.

Brief for Plaintiffs in Error.

In the Supreme Court of the United States.

No. 55.

JOHN W. DOANE, PATRICK J. TOWLE AND JOHN ROPER,

PARTNERS AS J. W. DOANE & CO., *Plaintiffs in Error*,

vs.

LOCKHART T. GLENN AND GEO. O. TALPEY.

In Error to the Supreme Court of the Territory of Colorado.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

Plaintiffs brought suit by attachment in the district court for the county of Weld, Colorado, on the 22d day of September, 1870, against Oliver S. Glenn and Rufus E. Talpey, partners as Glenn & Talpey, for the sum of $7,104.28. The usual writ issued, and September 23, 1870, the sheriff levied upon certain property named in the record. (P. 1 to 6.)

Subsequently to filing the declaration, to wit, December 17, 1870, Lockhart T. Glenn and George O. Talpey filed an interpleader, claiming a certain portion of the property attached as described in their plea. (P. 8.) Briefly stated, these interpleaders alleged ownership and possession of the property at the time it was attached.

Plaintiffs replied denying the ownership alleged by interpleaders, upon which issue was joined, a jury empanneled, the cause tried, and a verdict and judgment rendered in favor of defendants in error for the return of the property attached by virtue of the writ of attachment. (Record, pages 9 to 12.) Plaintiffs sued out their writ of error from the Supreme Court of Colorado to the district court of Arapahoe, and upon a hearing of the errors assigned, the supreme court affirmed the judgment of the said district court, whereupon plaintiffs sued out their writ of error to the Supreme Court of the United States. (Record, pages 50 to 75.)

Assignment of Errors.

The Supreme Court for Colorado erred in affirming the judgment of the court which tried the cause, for the following reasons:

That court erred—

1st. In refusing to instruct the jury as asked by the plaintiffs in error.

2d. By the instructions which were given to the jury at the trial.

3d. In refusing to strike out that portion of the evidence of the witness (Benson), as to the fact that the interpleading claimants were in possession of the property at the time of the levy.

4th. In excluding from the jury the deposition of the witness (Hanna).

5th. In that the verdict of the jury was manifestly against the evidence.

6th. In ordering the clerk to amend the verdict rendered in the case.

7th. In overruling the motion for a new trial.

8th. In admitting improper evidence on behalf of the interpleading claimants.

9th. In refusing to permit competent and material evidence to go to the jury, offered on behalf of plaintiffs.

10th. In rendering judgment for said interpleading claimants.

11th. In rendering judgment for more property than was claimed by the defendants in their interpleader.

12th. In failing to render a formal and proper judgment in the case.

Brief and Argument.

I.

1. Noticing these points, not always in the order they are stated, we observe relative to the 3d, 8th, and 9th assignment of errors: The court erred in permitting witness' (Benson) evidence to go to the jury, and refusing to exclude the same, when it appeared on his cross-examination that his knowledge was hearsay.

This witness' testimony will be found on page 13 of the record. It seems that Benson was the deputy sheriff who made the levy, and while he testified that he found the property in possession of the interpleading claimants, on cross-examination he said he did not know that they were in possession more than the other men, except from what they (the claimants themselves) told him.

The plaintiffs thereupon moved to strike out his testimony as hearsay, but the court overruled the motion, and the evidence went to the jury. (Page 14.) As hearsay evidence, this was clearly inadmissable, and calculated to prejudice the rights of plaintiffs. (Wilson *et al. vs.* Simpson *et al.*, 6 Howard, 120; Gray *vs.* Goodrich, 7 Johnson, 95.)

We suppose, however, the court regarded these declarations as part of the *res gestæ*, upon which ground alone can the ruling be sustained. We think the rule of law on this subject will not admit of such declarations. Be-

fore they would be admissible, it must appear they were part of the transaction involved in the issue being tried. That issue was the ownership of the property levied upon. If these interpleading claimants became the owners of the property by virtue of any contract or sale, any declarations made at the time of such contract, which would be a part of the transaction itself, might be regarded as a part of the *res gestæ*. Claimants had alleged in their plea ownership at the time of the levy, and for a long time previous, and that ownership was the issue being tried. The witness, however, speaks only of hearing that they were in possession, and says nothing of ownership.

It was a declaration of claimants relative to a fact not being tried, and in the language of Fletcher, Justice, in 9th Cushing, pp. 41, 42. "That had force by itself as an abstract statement, detached from any particular fact in question, depending for its effect upon the credit of the person making it," and is not admissable in evidence, but is hearsay. We cite Starkey's evidence, volume 1, p. 47, Enos *vs.* Tuttle, 3 Conn't, 250. Lund *vs.* the Inhabitants of Tyngsborough, 9 Cushing, 41. Greenleaf s Evidence, par. 107, notes. First Phillips' Evidence, pp. 194, 198. Haynes *vs.* Ruber, 24 Pickering, 242. Allen *vs.* Killinger, 9th Wallace, 480. Russel *vs.* Hudson River Railroad Company, 17 N. Y., 134. Anthony *vs.* Estabrook, Supreme Court of Colorado.

Upon the authorities cited, we claim there must be a main transaction with which the declaration is so connected as to form a part of it, and this declaration must be contemporaneous with the main transaction, and calculated to unfold and explain it. It must not stand apart as an abstract statement, but must tend to illustrate the main question.

This cannot be said to be true in the present case. We think it clear that the declaration admitted in evidence in no way tended to illustrate the alleged ownership of the

property in claimants. It was connected with no act, contract or transaction by which they became the owners. It meets none of the requirements to make it a part of the *res gestæ*. It has all the elements of hearsay.

2. We next call attention to the following question propounded for defendants in error to the witness, Rufus E. Talfey, p. 29.

"What interest have you, if any, in the property now in controversy?" To which he replied: "I have no interest in it, directly or indirectly, more or less." The objection is, that the witness ought to have been asked his interest in the property at the time of the levy. The answer does not tend to show that the witness and his co-defendant were not interested in the property at the time it was attached, or that it belonged to the interpleading claimants. The tendency of the answer was clearly to mislead the jury by impressing their minds with the idea that the witness never had any interest in the property, whereas he may have had no interest at the time of trial, and yet have been a part owner at the time of the levy, and it was the ownership at the time of the levy which was the material issue.

3. The next point under this head to which we call attention is the refusal of the court to permit the deposition of Hanna to be read in evidence to the jury. To the reading of this deposition the counsel for the defendants in error raised substantially the following objections, which were sustained by the court, and an exception allowed:

1. That the parties plaintiffs in this suit were different from those named in the commission.

2. That the deposition is in this cause and not in the interpleaders, and does not permit interrogatories to be propounded in behalf of the claimants.

3. That there is no authentication of the character of the notary public.

4. The commission is to take the deposition of James

H. Hanna, and the deposition taken is that of J. W. Hanna.

(See Record, p. 38.)

These objections were all made for the first time on the trial, and all go to the form and not to the substance of the deposition. We understand the rule to be well settled, that all objections which go to the form of a deposition, or *which might be obviated* by a re-examination of the witness, must be made before the trial, or they will be considered as waived.

Kimbal *et al. vs.* Cook, 1 Gil., 423-424.

Frink *vs.* McClurg, 4 Gil., 575-577.

Swift *et al. vs.* Castle, 23 Ills., 214.

In the case of Kimbal *et al. vs.* Cook, 1 Gil., 425, Caton, Justice, in delivering the opinion of the court says: "A party cannot be allowed to lull his adversary into security by his silence till the trial commences, and then spring an objection on him, which if sustained, may deprive him of the proof of material facts which he might have established in a more formal or regular mode, had the objection been made and sustained at an earlier period." These remarks we think are applicable to this case, and must commend themselves to the reason and judgment of the court.

But, in reply to the above authority, it may be said that the parties to this suit and those named in the *dedimus* are different, and that the commission issued out of the Weld County Court. In reply to this we say, that on an examination of this deposition there can be no doubt but it was taken in this suit, and the addition of Raymond's name as a member of the firm of J. W. Doane & Co., in the commission, does not make it a different suit; it is still a deposition in the case of J. W. Doane & Co. *vs.* Glenn & Talpey, and we insist, that when carefully examined, there is no uncertainty on this point, but that it plainly and palpably appears to be a deposition taken in

this cause. (See Voce *vs.* Lawrence, 4 McL., C. C., 203, 205.) But, even if it had been taken in a different suit, (a supposition which is contradicted by everything appearing in the deposition itself,) still we submit it was admissible as evidence in this case.

Wade *et al. vs.* King *et al.*, 19 Ills., 308.

McConnel *et al. vs.* Smith *et al.*, 27 Ills., 232.

In the case of Wade *et al. vs.* King *et al.*, cited above, Skinner, Justice, in delivering the opinion of the court, says: "The rule is, that depositions taken in a former suit between the same parties, involving the same question, or subject matter, are admissible when the question again arises for judicial determination. *And it is not material that the parties be identical* or that there be complete mutuality in respect to their relation to each other, or to the subject matter." Nor was it any valid objection that the commission issued out of the Weld County Court, if it appears to be a deposition taken in this suit. On this point we refer the court to Thompson *vs.* Stewart, 3 Conn., 180, and Scripture *vs.* Newcomb, 16 Conn., 592. In both of these cases the court hold objections of this character to be *matters of form only*, and we may here truly say, in the language of Hosmer, Chief Justice, in the case above cited from 3 Conn., 180, that the direction of this deposition "*is perfectly intelligible*," and *no doubt can exist* that it was intended to be used in the trial of this case.

The court will see from a stipulation filed in this suit, (see Record, page 9,) that it was only agreed to try the question of interplea in Arapahoe county, but that the clerk of the court in Weld county, in connection with this stipulation, entered an order changing the venue in the case. It further appears that the record was never certified to the court in Arapahoe county until the 19th of June, 1871, (see Record, page 10,) that the commission to take this deposition was issued on the 8th day of May, A. D. 1871, by George H. Mills, Esq., who is clerk of

both courts, and who certifies the record to this court from Arapahoe county; that said deposition was received by the said George H. Mills, opened and published on the 5th of July, A. D. 1871, by order of the court, in Arapahoe county, as a deposition in this cause. (See Record, pages 38, 40.)

Then how it is possible, with all these facts in the record, to say that this deposition was taken in a cause in another court, is beyond comprehension. It is certainly plain, that at the time the *dedimus* was sued out, it was supposed that the issue on this interplea would alone be tried in Arapahoe county.

But it is claimed that the deposition ought to have been excluded, because the interpleaders had no opportunity to file cross-interrogatories. By reference to record, the court will see that the notice to sue out this commission was served on the attorneys of the defendants in error only, and a copy of the interrogatories left with them; so this objection falls to the ground, they had ample opportunity to file cross interrogatories, had they seen fit to do so. We submit, therefore, that in any respect this point may be viewed, the deposition should not have been rejected.

II.

Noticing the first and second assignment of error, we suggest: 1st, that the court erred in the instructions given. Rec., p. 50.

The first of these instructions reads as follows:

"The burden of showing that they are the owners of the property in question, and were such owners at the time of the levy of the writ of attachment, is upon these interpleading claimants. But, if at the time of the levy of the writ of attachment in this case, the property was found in the possession of the interpleading claimants,

then, from such possession, the law raises a presumption that the interpleading claimants were the owners of such property, and unless it has been shown to the satisfaction of the jury, that such possession was colorable, or fraudulent, and a possession for the defendants in this suit, the interpleading claimants may recover."

This instruction was erroneous, *first:* Because it did not require the jury to found their belief of the fact, whether the interpleading claimants were in possession of the property in question, at the time of the levy of the writ of attachment, on the evidence given in the case. We insist that the instruction should have contained the words, "*if the jury believe from the evidence*," &c., for they had no right to determine the facts submitted to them from any other source whatever. In the case of Ewing *vs.* Runkle, 20 Ills. Rp., page 464, Justice Breese, in delivering the opinion of the court, says: "Juries should be permitied to believe nothing, except that belief be occasioned by evidence, and their minds should *always be directed to that, and to that alone, as the ground of their belief.*" This proposition is fully sustained by authority, and the importance and necessity of the rule, require that it should be observed in all cases. Any other rule leaves the jury to wander away from the evidence; to indulge in all kinds of speculations, and to make up their verdicts from their own opinions, or any other source of knowledge, whether it be evidence in the case or not. We cite on this point:

Ewing *vs.* Runcle, 20 Ills., page 464.

Matthews, use, &c. *vs.* Hamilton *et al.*, 27 Ills., 471, 472.

Patterson *vs.* Jenks *et al.*, 2 Pets., page 226.

Blackburn *vs.* Crawford, 3 Wall., pages 175, 186, 187, 194, 195.

The City *vs.* Babcock, 3 Wall., 240, 242, 244.

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Patterson *vs.* Jenks *et al.*, 2 Pets., page 226.

Blackburn *vs.* Crawford, 3 Wall., pages 175, 186, 187, 194, 195.

The City *vs.* Babcock, 3 Wall., 240, 242, 244.

Second;

But this instruction was erroneous for another reason intimately connected with the one which we have just considered. The Court told the jury that "*if at the time of the levy of the writ of attachment in this case the property was found in the possession of the interpleading claimants, then from such posession the law raises the presumption that the interpleading claimants were the owners,*" &c. Now, we submit that the question in this case to be determined, was one of fact and not of law. The fact of possession referred to in the instruction, was a part of the evidence tending to prove ownership in the property in question, and in the language of this court, in the case of Blackburn *vs.* Crawford, 3 Wall., page 195, "*under such circumstances* the law makes no presumptions. The facts referred to were a part of the evidence. They were to be weighed against the countervailing evidence. They might, by possibility, all be true, and yet," the interpleading claimants not be the owners of the property in dispute.

In the case last referred to, (3 Wall., 186,) the court had instructed the jury, that: If Mr. Crawford and Mrs. Taylor lived together as man and wife, that he acknowledged her as his wife and treated her as such, and the children which she bore during that time as his children, and permitted them to be called by his name, *then the presumption of law is in favor of the legitimacy of said children.* This instruction was held to be erroneous for the reasons before stated, and to the same effect are the cases of the City *vs.* Babcock, 3 Wall, 240, 244. Patterson *vs.* Jenks *et al.*, 2 Pets., 226.

The principle involved in the case of Blackburn *vs.* Crawford, is the same as that contained in the instruction of the court now under consideration. It may be assumed, however, that Mr. Greenleaf, in his work on evidence, vol. 1, § 34, lays down the rule, in relation to the ownership of personal property; that "*proof of possession is pre-*

sumptive of ownership," and that the court has substantially followed this language; but it will be seen that Mr. Greenleaf also says, § 28, of the same volume, that "when the husband and wife cohabit together as such, and no impotency is proved, *the issue is conclusively presumed to be legitimate*," so that the court in the case of Blackburn *vs.* Crawford, also followed Mr. Greenleaf, so far as the presumption was concerned. The only difference between the presumption in the two cases will be found to be, that the one is *conclusive* and the other *disputable*, the presumption in the case of the legitimacy of children is conclusive, while that in the case of property is disputable.

(Greenlf. on Ev., Vol. 1, § 28, 33, 34.)

The error in this instruction, does not, however, grow out of the fact that such presumptions are, or are not, recognized in the rules of evidence: but, that the court has no right to tell the jury that such presumptive facts proved, or tended to prove the issue to be tried. Such an instruction invades the right of the jury and takes from them the privilege to judge of the question, untrammelled, as it is given to them in evidence; in other words, it substitutes the opinion of the court as to the effect of the testimony, and, in this case, left the jury, when they retired to consider and make up their verdict, to conclude from certain facts in evidence, that *the law presumes* the property in dispute belongs to the claimants, and, therefore, they must so find, notwithstanding other facts and circumstances may have tended to prove the contrary. In this light the instruction was calculated to mislead the jury.

Third. Again, the court attached a qualification to this instruction which we assert was also erroneons. The jury were in effect told that this presumption was so great that nothing short of fraud or a colorable possession of the property for the use of the defendants in the attachment suit could overcome it. The words of this portion of the instruction sre as follows: "Unless it has been shown to

the satisfaction of the jury that such possession was colorable or fraudulent, and for the use of the defendants in this suit."

The force and effect of this instruction, when considered as a whole, was substantially this: If the interpleading claimants were in the possession of the property in question, at the time of the levy of the writ of attachment, then they may recover, unless it be shown to the satisfaction of the jury that their possession was colorable or fraudulent, and for the use of the defendants in the attachment suit. It will be seen that this virtually excludes from the mind of the jury every other possible hypothesis, deducible from the evidence, tending to show that they were not the owners of this property; in other words the jury were virtually told that the presumption of law arising from this fact of possession, was so great, so conclusive, that nothing short of fraud, shown to their satisfaction by the testimony, would overcome it.

This we contend was not the law applicable to the case at bar, for we may admit, for the purposes of this argument, that the interpleading claimants were in possession of the property at the time of the levy of the writ, by means of no fraudulent or colorable possession whatever upon their part, and yet it does not follow as a *conclusion* or *presumption* of law that they were the owners of the property. The evidence most certainly disclosed the fact that these interpleading claimants were no more in possession of the property, than the other three or four persons present at the time the witness, Benson, levied the writ. The evidence certainly disclosed the fact that he, (Benson) at the time the writ was levied, found the property in the possession of "*George Glenn and Dr. Talpey,*" other and different persons from the interpleading claimants. The writ of attachment offered and received in evidence was certainly *prima facie* evidence, as we will hereafter show, that the property belonged to the defendants in the attachment suit,

and the plea of interplea admits that the property described in it, was taken on said writ as the property of the defendants in the attachment suit. There was also evidence tending to prove that the pecuniary condition of these interpleading claimants was such as to make it improbable for them to have ever purchased and paid for this property with their own money.

But the evidence of Blackington, Record, p. 36, shows beyond all question that George O. Talpey, one of the interpleading claimants, states to him that his brother (Rufus E. Talpey) owned a half interest in the cattle. All these items of evidence, which we claim the plaintiffs had a right to have the jury consider, are excluded from their minds by this instruction and are entirely overshadowed by this *presumption of law arising from a bare naked possession*, for it amounts to this and nothing more, (as we will show the court hereafter) unless it shall have been shown to the satisfaction of the jury to have been fraudulent. But this is not all. The instruction, as we understand it, treats the presumption of law arising from possession, as conclusive in this case, *unless fraud exists.* If this be not its effect, then why did not the court direct the mind of the jury to these other facts and circumstances in evidence already alluded to, which tended at least, as we claim, to rebut the presumption of possession, if in fact they did not overcome it entirely? If we are correct in this conclusion, then we are prepared to show that the instruction cannot be supported by authority.

Mr. Greenleaf, in his work on evidence, vol. 1, § 33 and 34, classes presumptions of law of this kind as *disputable presumptions*, which shows very clearly that they are in no respect regarded as conclusive, but may be disputed or rebutted. It is true in § 34 he says that "proof of possession is presumptive proof of ownership," and refers to the cases, Amory vs. Delamirie, 1 Stra., page 505; Magee vs. Scott, 9 Cush., 150. An examination of these cases will

show that possession of personal property is only *prima facie evidence of title*, and it has been held that trover may be maintained upon such *prima facie* proof of title.

Now if this be so then this instruction was erroneous and must have mislead the jury. In the case of Bergen *et al. vs.* Riggs, 34 Ills., page 173, Chief Justice Walker, in delivering the opinion of the court, says: "It is insisted that the third instruction given for the defendant below is erroneous. It asserts that possession of personal property is *prima facie* evidence of ownership, and if defendant had possession for about one year prior to the sale, then in order to overthrow such *prima facie* case, it was incumbent on plaintiffs to prove that the title to the horse was not in the defendant, but in the United States Government. As a general proposition, possession of chattels creates a presumption of ownership, *slight it may be*, but sufficient until overcome by proof, yet the *prima facie* case may be rebutted by the circumstances attending the possession, it may be rebutted by evidence either circumstantial or positive, but until rebutted it is evidence of ownership."

An examination of this case will show that the animal in question was marked with the government brand, indicating that it was the owner, and the court held that this brand was sufficient evidence to overcome and rebut the presumption arising from a possession for a year, and that the instruction was calculated to mislead and did mislead the jury; that the instruction should have been refused, or so modified as to inform the jury that the government brand indicating ownership overcame the presumption of possession.

This case is directly in point on the question now under consideration. To the same effect is the case of Ricard *vs.* Williams, 7 Wheat., 105.

The writ of attachment and sheriff's return were offered and received in evidence on the part of the interpleading

claimants to sustain the issue in their behalf, and whether it makes for or against them matters not now; it is evidence for the plaintiffs as well as for the interpleading claimants, and if by this instruction its force and effect as evidence was not considered by the jury, the motion for a new trial should have been allowed.

This writ commanded the sheriff to attach so much of the estate, real and personal, of the defendants in the attachment suit, as would be sufficient to satisfy the debt and cost claimed; to hold the same for further proceedings, and the sheriff returns that he levied upon the property in question. Now, how can it be said that this was not *prima facie* evidence that this property belonged to Oliver S. Glenn and Rufus E. Talpey, as against the interpleading claimants, and would have been sufficient to support the issue on behalf of the plaintiffs, without any further evidence, until rebutted? In support of this proposition we cite the court to the following authorities:

Phillips on Ev., vol. 2, page 368, note.

Haskill vs. Given, 7 S. & R., 371.

Dutton *vs.* Tracy, 4 Conn., 79.

Gifford *vs.* Woodgate *et al.*, 11 East., 297.

Field *et al. vs.* United States, 9 Pet., 182, 201.

Let us now look at the condition of the case, as developed by the evidence before the jury, when this instruction was given, and upon which it is based.

1st. We have Benson's *hearsay* evidence, from which it is claimed that the interpleading claimants were in possession at the time of the levy of the writ; 2d, we have the statement of Rufus E. Talpey, that in May, 1870, he saw the cattle penned, and in their possession in Texas. This is the case for the interpleading claimants, and *all of it*, so far as this instruction seeks to develop it before the jury. On the other hand, we have the evidence of Benson that when he levied the writ he found the property: 1st, in the possession of George Glenn and Dr. Talpey; 2d, we

have the writ of attachment and return thereon, which, as we have before shown, was *prima facie* evidence, that the defendants in the attachment suit were the owners of it. Thus we have two *prima facie* cases; one in favor of the plaintiffs in error, and the other in favor of the defendants in error, and it would seem as if it left the case pretty equally balanced. Nevertheless under such circumstances the court instructed the jury, that if the property was in possession of the interpleading claimants at the time the writ was levied, that from such possession the law presumed they were the owners, and they might recover unless it was shown that such possession was colorable or fraudulent and for the use of the defendants in the attachment suit; thus ignoring entirely the presumptive case raised by the writ and return, together with all other evidence in the case which either tended to rebut this possession or overcome it. This we insist was error, for which a new trial should have been granted.

The second and third instructions given by the court refer exclusively to the question of fraud spoken of in the first instruction (see record, page 51), and are objectionable for the same reasons already urged against the first. We insist that the *prima facie* case of ownership could have been rebutted or overcome by evidence without such possession being fraudulent, and that the first, second and third of these instructions were erroneous for this reason.

We suggest:

2d. That the court erred in refusing the instructions asked by plaintiffs in error. (Record, 49, 50.)

The first of these is as follows: "The jury are instructed that the burden of proof in this case was on the interpleaders, George O. Talpey and Lockhart T. Glenn, to show that they were the owners of the property attached in this suit, and if the jury believe from the evidence in this case, that these interpleaders have failed to make

out a clear case of ownership, they must find for the plaintiffs."

We submit that this instruction briefly and concisely presented the law of the case as it was developed in the evidence, and should have been given. The plea filed by the interpleading claimants, admits that the property described in the plea was levied upon by the writ of attachment. The writ and return, as we have before shown, were *prima facie* evidence that the property belonged to the defendants in the attachment suit; the burden of proof then was upon these claimants to make out a clear case of ownership, and if they had failed to do so, they were not entitled to a recovery; this was all that was asked by the instruction.

The right to require the court to give an instruction, as asked, when the same is in conformity with the law, is well settled, and if the court be apprehensive that the jury may not fully comprehend such instruction, or are likely to be misled thereby, unless explained, it then becomes the province of the court to give such additional instruction as may be necessary to obviate such danger or misapprehension.

State *vs.* Wilson, 2 Scam., 226.

Hays *vs.* Borders, 1 Gil., 66.

We concede that if in another form the court had substantantially instructed the jury as asked, it would not have been error, but this was not done. All the evidence given in the case which tended to show that these claimants had no right of recovery, is treated, so far as the instructions given are concerned, as though such evidence did not exist. The attention of the jury is in no instance drawn to it, and the only portion of the evidence to which the mind of the jury is directed by the court is the hearsay testimony of Benson in relation to the possession of the property when the writ was levied, and this was misapplied, as we think we have clearly shown. We think

the plaintiffs were entitled to have this instruction given to the jury, and, that their rights have been prejudiced by the refusal to do so. This fact will more fully appear hereafter when we examine the evidence in connection with the verdict, for the purpose of showing that it is not supported by it. If, as we believe, the verdict is against the evidence, then the greater reason exists why this instruction should have been given. Again it must be observed in this connection that the writ and the officers return was *prima facie* evidence that the property attached belonged to the defendants in the attachment suit. It was for these interpleading claimants to overcome this evidence, and the bare proof of possession of the property in themselves was not sufficient for the purpose.

The second instruction asked on behalf of the plaintiffs in error and refused by the court reads as follows:

"The jury are instructed that the mere fact that the witness Benson, when he attached the cattle in controversy, found these two interpleaders in charge of the cattle in connection with three or four other persons, does not establish or prove that the cattle were in the possession of the interpleaders, and if the jury believe from the evidence that these interpleaders have not clearly proven that they were the owners of the cattle, and in the sole possession of the same, they will find for the plaintiffs."

There was certainly evidence in the case on which to base this instruction. Benson testified that when he levied the writ, he found the property in the possession of George Glenn and Dr. Talpey. (See Record, page 18.) This certainly did not prove possession in the interpleading claimants, for their names are different. On his cross-examination this witness says: "*These young men* were in possession of the cattle." The fair inference is that "*these young men*" refers to George Glenn and Dr. Talpey. The witness then names three other parties, making in all five persons with the cattle at the time, and adds that he "*don't*

know that they were in possession more than the others." He saw them all there with the cattle. The entire case of these claimants rests upon this testimony, and upon the principle of law growing out of the possession, which it is claimed this evidence establishes. While on the other hand, we insist that the proof did not show that they were in the possession, but on the contrary, the evidence showed the property to be as much in the possession of the other three persons as in George Glenn and Dr. Talpey, and we insist that this was not sufficient to show that the claimants were in possession at all, but on the contrary, that they were not; and if they were not in possession, and this evidence, as we claim, tended to prove it, then it was error to refuse the instruction. The plaintiffs had the right to have this view of Benson's evidence thus presented to the jury, for their consideration.

Sidwell *vs.* Lobly, 29 Ills., pp. 439, 449.

Let us again refer to the fact, that the writ and return of the officers were a *prima facie* case; that the defendants in the attachment were the owners of the property in dispute, and that it was incumbent on the interpleading claimants to overcome such *prima facie* case before they could recover. This fact shows that they made out no case whatever, and for this reason the instruction should have been given to the jury.

The third instruction asked on behalf of the plaintiffs and refused is as follows: "The jury are instructed that the mere fact that the witness, Rufus E. Talpey, saw the cattle delivered to the interpleaders, does not prove that they were the owners of the same, but that to establish ownership in themselves they should have proven a sale of the cattle and a delivery of them, and that they thereafter continued in the actual possession of the same; and if the jury are satisfied from the evidence that the interpleaders have not made out a clear case of ownership and possession, they should find for the plaintiffs."

To understand the object of this instruction a brief statement of the case, in connection with the evidence, is necessary. The plaintiffs as attaching creditors had acquired rights to the property by virtue of the levy of the writ. The defendants in error interpleaded, claiming that they were the owners of the property. The officer's return on the writ, being *prima facie* evidence that the property in question belonged to the defendants in the attachment suit, it then clearly devolved on the interpleading claimants, to prove a better and more perfect title in themselves. The ordinary mode in proving title to property in cases of this kind, is by showing that it was purchased, paid for, and delivered; and in the case of attaching creditors, under the statute of frauds, an immediate delivery and continued possession thereafter is requisite to make good the title of the claimants. Now, we contend, that proof of a mere possession was not sufficient to overcome the *prima facie* case made in favor of the plaintiffs, by the officer's return to the writ, and that it was incumbent on the interpleading claimants to show a purchase, delivery, and continued possession thereafter, or, at least, some acts or circumstances connected with their possession, which would tend to prove, or did prove, a title to the property.

What is the evidence produced by these claimants to prove such title? The first item is the evidence of Benson, and conceding, for the purpose of this argument, that when this witness says he found the property, at the time of the levy, in the possession of *George Glenn and Dr. Talpey*, he thereby meant these claimants, and what fact is proven? Nothing but a bare naked possession at that particular time. The next item of testimony on this point is the evidence of Rufus E. Talpey, (Record, p. 15,) who on his direct examination, stated that he knew that the interpleading claimants were the owners of the property, but, when required to state the grounds of his knowledge, what was it? Nothing more, or less, than that he had

seen the cattle penned and in their possession; he knew nothing of any contract of purchase, did not know that they ever paid any money for the cattle, in a word, the sole and only ground for his statement made on his direct examination, was that he saw the "*cattle penned and in their possession*," (see Record, page 16), and this, it will be observed, occurred in May, A. D. 1870, in the State of Texas, nearly four months prior to the levy of this writ, and certainly only amounted to proof of a bare naked possession at that particular time.

There is no proof of any purchase of this property; no proof whatever that it was ever, at any sale, delivered to the interpleading claimants as purchasers, or that they thereafter continued in the possession as required by the statute of frauds. We, therefore, insist that it was incumbent on them to show such a state of facts to entitle them to recover; that a bare naked possession of the cattle at two different times was not sufficient to sustain their claim.

This instruction was asked to meet this view of the case, and if it be true, under the statute of frauds, that a purchase, delivery, and continued possession, were requisite to be proved in order to show title in these claimants as against the attaching creditors, then, on the facts disclosed by the evidence, the plaintiffs had a right to have this instruction given to the jury.

The fourth instruction refused by the court is as follows:

"The jury are instructed that the fact that Rufus E. Talpey and George O. Talpey were parties to this suit goes to their credibility, and it is the duty of the jury to consider this fact as going to the credibility of these two witnesses."

This instruction is based upon the laws of Colorado making parties to the record competent witnesses in the cause (see laws 1870, page 62). That both these witnesses were parties to the record will not be denied. The first

section of the statute referred to expessly provides, that the fact of a witness being a party may be shown to affect his credibility, and this was the object of the instruction.

Prior to the passage of this statute there was great diversity of opinion in the courts of the various States, as to whether a party to the record was a competent witness or not; this court, however, has held that a party to the record is not a competent witness.

Smith *vs.* Strader, 4 How., 405.

Bridges *vs.* Armour, 5 How., 91.

Now, if prior to the passage of the act of 1870, these two witnesses were not competent to give evidence at all, we think that since its passage their evidence must be received and taken by the jury subject to the provisions of the statute, which expressly provides that, if parties to the record, it may be shown as affecting their credibility. This being true the court most unquestionably erred in refusing the instruction.

It may be said, however, that Rufus E. Talpey's testimony was against his own interest and therefore as to him the instruction asked was erroneous. We do not admit this proposition as applicable in this instance, but if true, it would not affect this case; the statute fixes the conditions upon which he may be a witness, and certainly these plaintiffs were entitled to have the jury informed of the effect and degree of credit to be attached to his evidence.

The affidavit in this suit charges Rufus E. Talpey and his co-defendant with covering up their property to cheat and defraud their creditors. This was one of the grounds upon which the writ of attachment was issued, and in such case it occurs to us that his interest and motives all tended to influence his testifying in favor of these claimants.

The fifth instruction asked on behalf of the plaintiffs and refused by the court is as follows:

"It is a rule of law, that whatever may be the issue between the parties upon the pleadings, either party has the

right to establish the existence of fraud, by proof of facts, that show the existence of fraud in the opinion of the jury, between the parties, and when, in the opinion of the jury, upon the evidence, the fact of fraud is established, the party upon whom the fraud is established cannot claim any legal rights by virtue of any contract or legal status arising out of any condition (of facts) in which such fraud exists.

Whether there was any fraud practised between the defendants in this suit and the interpleaders, to keep this property from the reach of the creditors of the elder Glenn and Talpey was a question of fact for the jury to determine from the facts and circumstances given in evidence. (Hays *vs.* Bernard, 38 Illinois, 302 and 303.) There were facts and circumstances in evidence tending to show collusion between the parties, and we insist that this instruction ought to have been given.

The sixth instruction asked and refused is as follows:

"The jury are instructed that the law, having regard to the fact that a party committing a fraud seeks by every means to conceal it, gives to the jury a broad and liberal power and right to infer from the facts and circumstances attending a transaction, if in the opinion of the jury such facts and circumstances as are proved establish or tend to the establishment of fraud upon the party charged."

Whether the facts and circumstances in evidence in this case were sufficient to establish fraud was a question for the jury alone, but we claim that the jury in passing upon the evidence had the right to consider all the surrounding circumstances which tended to prove fraud or collusion, and that in such consideration of all surrounding circumstances the jury must find the fact. If this were not so, and a party in all cases must produce positive proof to establish fraud, it would be almost impossible to ever find evidence sufficient to do so. The acts of parties are frequently termed in law "*badges of fraud*" from other facts

and circumstances it is often said, that the jury were justified in inferring fraud, and we do not see why this rule should have been denied in this case.

III.

We also insist that the motion for a new trial should have been allowed because the verdict of the jury was against the evidence. (See record, page 51.)

By this verdict the jury merely find the issue for the interpleading claimants, by the word issue we presume must be intended the property described in the interplea, so that the jury found that the interpleading claimants were the owners of the 755 head of cattle, six horses, one saddle and bridle, and one wagon.

If this is the finding, and we do not see how any other interpretation can be placed upon it, we say that the evidence did not warrant such finding. Let us examine the evidence on this point. The witness, Benson, says: "*I found the property in possession of George Glenn and Dr. Talpey.*" (See record, page 13.) Who these parties are is not shown, and we insist that they are different persons from these claimants, so that this part of Benson's evidence does not support the verdict. On his cross-examination Benson says: "*These young men were in possession of the cattle,*" whether he means by the use of the words, *these young men*, the persons named in direct examination or the interpleading claimants, does not appear. We think the only inference to be drawn from the statement is that he refers to the persons named in his direct examination, and if so, there is nothing whatever in his evidence to support this verdict. But for the purposes of this argument only we will concede that when he said in his cross-examination, "*these young men were in possession of the cattle,*" he referred to these claimants; here we have some testimony as to the cattle, but nothing more. Take this item therefore in connection with Rufus E. Talpey's evi-

dence, and let us see how far this verdict is supported by the testimony. Rufus E. Talpey, on his direct examination, says, that the interpleading claimants *were the owners*, and also says it consisted of 755 head of cattle, but don't know of any other property, except camp outfit, probably a wagon and six horses. (See record, page 15.) On cross-examination this witness gives as the source of his knowledge that it was grounded upon having seen the cattle penned and in possession of the claimants. (See record, page 16.) Now this is all the evidence upon which this verdict is based. If it proves anything, it is that they had possession of the 755 head of cattle, and is no proof whatever as to the six horses, saddle and bridle, and wagon. And yet this verdict is for the whole of the property described in the plea. It is well settled that a verdict for more than is warranted by the evidence is erroneous, and should be set aside.

Pierce *vs.* Roach, 40 Ills. 292.

Schwabacher *vs.* Wells, 49 Ills. 257.

Thus far we have viewed the evidences in the most favorable light for the interpleading claimants, and we now go one step further and take into the account the officer's return to the writ of attachment. We have already shown that this return was *prima facie* evidence that Oliver S. Glenn and Rufus E. Talpey were the owners of this property. This evidence the jury had no right to ignore. We have also shown in the discussion of the first instruction given by the court, that the officer's return was more than sufficient to rebut the presumption of *possession*, so far as it was evidence of ownership in these claimants, and now having reached this point, we confidently ask, what evidence is there in this case to support the verdict? But there is still another view of this case to which we now call attention, and which we regard as conclusive on this point. The defendants in error have rested their entire case upon the principal that possession of personal

chattels is *prima facie* evidence of ownership; and while it will not be disputed that this is true as a general proposition of law, we deny that they have brought themselves within this rule as shown by the evidence produced on the trial in this case. Let us, therefore, consider this proposition of law in detail, and endeavor to apply it to the evidence now under consideration. "As a general proposition, possession of chattels creates a presumption of ownership, slight it may be, but sufficient until overcome by proof."

Burgen *et al vs.* Riggs, 34 Ills. 173.
Amory *vs.* Delamirie, 5 Stra. 504.
Magee *vs.* Scott, 9 Cush. 150.

It is held in these cases that possession is only *prima facie* evidence of title, "*good against everybody but one proving property; that is against any one but the right owner.*" The same principal maintains in relation to the ownership of real property, (Ricard *vs.* Williams, 7 Wheat. 59,) and the rule applicable in criminal cases; that the recent possession of stolen property is *prima facie* evidence of guilt involves the same principal.

Greenlf. Ev. Vol. 1, sec. 34.

We have already shown the court that the question involved in this proceeding is analogous to the action of replevin when the plea of property is in issue, or in detinue, and that the status of the defendants in error on the trial of this issue was the same it would have been, had they commenced an action of replevin against the sheriff to recover the possession of the property in question, and we contend that the interpleading claimants on the trial were required to produce as strong proof in support of their right to the property in controversy, as they would, had their action been in replevin.

"Where the issue in replevin raises the question of title the plaintiff must prove at the time of the caption that he

had a general or special property in the goods taken and the right to the immediate and exclusive possession."

Greenlf. Ev. vol. 2, sec. 561.

In this case the claimants do not pretend to claim by virtue of any special property in the chattels described in their plea, but insist that they were the *absolute owners* thereof, and we strenuously urge that in such cases, proof only that they were in possession of the property at the time of the levy of the writ of attachment, without any further evidence to show the character and nature of their possession, *was not sufficient* to entitle them to a recovery. The *onus* was upon them to show that they had either a general or special right to the property in question, and the only evidence offered to substantiate this right is that the cattle were in their possession at the time of the levy of the writ. We insist, therefore, that the mere fact of possession, (which is all that is shown in this case,) apart from property, was not sufficient to entitle these claimants to a verdict.

Waterman *vs.* Robinson, 5 Mass. 303.
Harris *vs.* Smith, 3 S and R. 23.
Whitewell *vs.* Wells, 24 Pick. 25, 29.
Harrison *vs.* McIntosh, 1 Johns. 384.
Tuthill *vs.* Wheeler, 6 Barb. 364.
Butts *vs.* Collins, 13 Wend. 139.
Greenlf. on Ev., vol. 2, sec. 561.

Now, what was the possession of the defendants in error at the time this writ was levied? Was it that of owners, or that of mere servants? If the latter, most clearly no case was made out. In the case of Ricard *vs.* Williams, 7 Wheat., p. 105, Justice Story, in delivering the opinion of the court says: "Undoubtedly, if a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of ownership and seisin of the inheritance. "*But it is not the possession alone, but the possession accompanied with the claim of the fee that gives this effect,*

by construction of law, to the acts of the party. Possession, per se, evidences no more than the mere fact of present occupation by right; for the law will not presume a wrong, and that possession is just as consistent with a present interest, under a lease for years, or for life, as in fee." So we say' in this case, that the possession of the interpleading claimants is just as consistent with an interest as "servant or depository for safe custody," as it is of absolute ownership.

In the case of Conkwright *vs.* The People, 35 Ills. 204, the Supreme Court of Illinois held that possession of property soon after it was stolen *is not of itself prima facie* evidence that it was stolen by the party in whose possession it was found. Now, upon an examination of the evidence, the court will see that at the time Benson, deputy sheriff, levied upon the property in question these interpleading claimants did not claim to be the owners of the property. The most that can be claimed for this evidence is, "*that they were found in possession of it,*" nor is there one single act or circumstance, disclosed in the evidence, tending to prove that at time they claimed to be the owners of this property. As before stated, this entire case rests upon the word *possession,* and upon nothing else. According to all the authorities, it was incumbent upon them to show a general or special property in the goods attached, and the authorities just cited show that the mere fact of possession is not sufficient to establish such a right. But if the court should think that the bare fact of possession would be sufficient as a *prima facie* case, then, when we consider the fact that the officers return was *prima facie* proof that this property belonged to the defendants in the attachment suit, the conclusion must follow that this verdict is against the evidence, and that the court erred in refusing a motion for the new trial.

IV.

In conclusion, we will briefly refer to one other point, which is, that the verdict of the jury is uncertain, and does not find the right of property in the interpleading claimants. If we are right in this conclusion, that this proceeding is analogous to replevin, where the plea of property is in issue, then the verdict of the jury should have found the right of property either in the claimants or in the plaintiffs; and especially should this finding appear, where, as in this case, there was no proof whatever as to a residue of the property claimed in the plea of interplea. The court, however, instructed the jury as to the form of this verdict, and it was followed. Both verdict and instructions were objected to and an exception taken. As the verdict now stands, it does not show that the jury found the property in dispute to belong to the defendants in error, and without such finding we claim they were not entitled to a judgment.

Rev. Statutes of Col., p. 60, sec. 21.

Finally, on a careful review of the whole case, we feel confident that the court below erred in the rendition of the judgment, and in overruling the motion for a new trial, for the reasons given in this argument. We, therefore, ask that the judgment be reversed and the cause remanded for a new trial.

Respectfully submitted.

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